DOCKET

No. 07-320
Title: Jack Davis, Appellant
v.
Federal Election Commission
Docketed: September 11, 2007
Lower Ct: United States District Court for the District of Columbia
Case Nos.: (06-01185)
Decision Date: August 9, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 7 2007	Statement as to jurisdiction filed. (Response due October 11, 2007)
Oct 9 2007	Order extending time to file response to petition to and including November 13, 2007.
Nov 13 2007	Order further extending time to file response to petition to and including December 4, 2007.
Dec 4 2007	Motion to dismiss or affirm filed by appellee Federal Election Commission.
Dec 19 2007	DISTRIBUTED for Conference of January 11, 2008.
Jan 11 2008	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. The brief of appellant is to be filed on or before Wednesday, February 20, 2008. The brief of appellee is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 30 2008	SET FOR ARGUMENT ON Tuesday, April 22, 2008.
Feb 20 2008	Joint appendix filed.
Feb 20 2008	Brief of appellant Jack Davis, Appellant filed.
Feb 27 2008	Brief amicus curiae of Cato Institute filed.
Feb 27 2008	Brief amici curiae of Gene DeRossett, and J. Edgar Broyhill II filed.
Feb 27 2008	Brief amicus curiae of Center for Competitive Politics filed.
Feb 27 2008	Brief amici curiae of James Madison Center for Free Speech and Citizens United filed.
Mar 11 2008	Record received from U.S.D.C. for the District of Columbia Circuit. (1 box)
Mar 19 2008	Brief of appellee Federal Election Commission filed.
Mar 20 2008	CIRCULATED.
Mar 26 2008	Brief amicus curiae of Common Cause filed. (Distributed)
Mar 26 2008	Brief amici curiae of Democracy 21, et al. filed. (Distributed)
Apr 11 2008	Reply of appellant Jack Davis, Appellant filed. (Distributed)
Apr 22 2008	Argued. For appellant: Andrew D. Herman, Washington, D.C. For appellee: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C.

JURISDICTIONAL STATEMENT

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Supreme Court, U.S.
FILED

No. ___ 07-320 SEP 07 2007

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IN THE

Supreme Court of the United States

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002 created the so-called "Millionaires' Amendment." The three-judge district court found that Congress enacted section 319 to achieve equity between congressional candidates utilizing personal funds for their campaigns and candidates relying mainly on contributed funds. Under the statute, when candidates for the United States House of Representatives exceed $350,000 in personal campaign expenditures their opponents may be entitled to receive: 1) contributions from donors at triple the statutory limit; 2) contributions from donors who have reached their statutory limit for aggregate campaign donations; and 3) coordinated expenditures from party committees in excess of the statutory limit. To effectuate application of section 319, the statute also imposes significant notification and disclosure obligations upon self-financed candidates. The questions presented are:

1. Whether the three-judge district court erred in finding that Congress's attempt to equalize a potential imbalance in resources between congressional candidates violates neither the First Amendment to the United States Constitution nor the Equal Protection Clause of the Fifth Amendment.

2. If equalizing a potential imbalance in resources of congressional candidates is constitutional, whether the federal statutory provision accomplishes the stated purpose.

PARTIES TO THE PROCEEDINGS

Jack Davis is the appellant in this Court and was the plaintiff in the three-judge district court.

The Federal Election Commission is the appellee in this Court and was the defendant in the three-judge district court.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court is not yet reported. *See* Appendix ("App.") 1a-18a. Appellant's notice of appeal is reprinted at App. 33a.

JURISIDICTION

The decision of the three-judge district court was issued on August 9, 2007. Appellant filed his timely notice of appeal on August 16, 2007. This Court has appellate jurisdiction pursuant to section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14. App 32a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This constitutional challenge is brought pursuant to the First Amendment to the United States Constitution, reprinted at App. 20a, and the Equal Protection Clause of the Fifth Amendment to the United States Constitution, reprinted at App. 20a. Plaintiff challenged section 319 of BCRA, reprinted at App. 27a-31a, which is codified at 2 U.S.C. § 441a-1, reprinted at App. 21a-26a.

STATEMENT OF THE CASE

This case presents a facial challenge to the constitutionality of the so-called "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 319, 116 Stat. 109-12 (codified as amended at 2 U.S.C. § 441a-1). A three-judge panel of the District Court for the District of Columbia held that the provision violated neither the First Amendment to the Constitution nor the Equal Protection Clause of the Fifth Amendment. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. *See* BCRA § 403(a)(3).

In 2006, appellant Jack Davis ran as the Democratic Party's candidate for New York's 26th Congressional District seat in the United States House of Representatives. In lieu of relying on campaign contributions, appellant elected to fund his election campaign primarily, though not exclusively, with personal funds. Appellant exceeded the statute's $350,000 personal spending threshold and ultimately triggered an increase in the contribution limits applicable to his opponent. *See* BCRA § 319(a). The statute authorized his opponent to: (1) receive contributions at triple the then-$2,100 per election limit for each donor; (2) receive these tripled contributions from donors who had already reached the normal $37,500 per election cycle limit for aggregate campaign donations; and (3) to coordinate with his political party committee to receive

additional party expenditures over the normal $10,000 per election limit. *See id.*[1]

Obviously, BCRA applies standard contribution limits and regulations to races between candidates relying mainly on private contributions. In contrast, under BCRA's Millionaires' Amendment a candidate who chooses to engage in personal campaign expenditures – political expression "at the core of our electoral process and of the First Amendment freedoms," *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quotations omitted) – confronts an opponent entitled to collect funds under contribution limits that are significantly higher than normal.

In light of the statute's unique and disparate treatment of his core political expression, and pursuant to BCRA § 403(a), appellant filed suit on June 28, 2006, requesting declaratory and injunctive relief.[2] In challenging the constitutionality of the Millionaires' Amendment, appellant looked to this Court's opinions addressing restrictions on campaign expenditures and contributions.

Congress's first contemporary regulation of campaign finance occurred in 1971, when it enacted the Federal Election Campaign Act ("FECA"). *See* Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455). As amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263,

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[1] Although straightforward in summary, the statute's triggering provision and means for calculating the permissible amount of increased contributions are complex. The timing and accounting procedures are based on complicated formulae that require continual updating of a self-financed candidate's spending while allowing the contribution-financed candidate to rely on less-exacting calculations. *See* 2 U.S.C. § 441a-1(a). Congress also enacted an extensive disclosure and notification process to facilitate application of the statute. *See id.* § 441a-1(b).

[2] The district court found that because BCRA § 319's "additional disclosure requirements impose an injury-in-fact on self-financed candidates" appellant had standing to challenge the provision. App. 6a.

FECA established, *inter alia*, limits on the amount of money that individuals, political committees, and political parties were permitted to contribute to candidates for federal office. It also placed limits on candidates' campaign expenditures from personal resources; *e.g.*, limiting most candidates for the House of Representatives to $25,000 in personal expenditures.

In *Buckley* this Court considered challenges to various FECA provisions, basing much of its analysis on two fundamental principles. First, this Court established that while limits on both contributions and expenditures implicate the First Amendment rights of free speech and free association, restrictions on expenditures constitute "significantly more severe" restrictions than contribution limitations. *See* 424 U.S. at 19-23. Specifically, this Court stated that limitations on a candidate's personal expenditures "impose a substantial restraint on the ability of persons to engage in protected First Amendment expression" and stressed that "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 52-53.

Second, this Court recognized that the government has a compelling interest in the "prevention of corruption and the appearance of corruption." *Id.* at 25. While the court did not define "corruption," it repeatedly referred to "*quid pro quo*" arrangements in which contributions or expenditures were made in order to secure or "influence" a particular action. *See id.* at 26, 27, 45. Because contribution limits address this interest, *Buckley* upheld the constitutionality of these FECA restrictions. *See id.* at 24-38.

In contrast, this Court found that personal expenditures actually "reduce[] the candidate's dependence on outside contributions and thereby counteract[] the coercive pressures

and attendant risks of abuse to which the Act's contributions limitations are directed." *Id.* at 53. Because the "ancillary" interest of "equalizing the relative financial resources of candidates" did not justify the constitutional intrusion of such limits, this Court rejected FECA's restrictions on a candidate's personal expenditures. *Id.* at 54.

Buckley also rejected a Fifth Amendment equal protection challenge to FECA's public financing provision, largely because such restrictions eliminate the deleterious influence of large private contributions. *See id.* at 95-97.

In a series of decisions following *Buckley*, this Court recognized Congress's legislative authority to protect the integrity of federal elections and prevent corruption of federal office-holders. *See, e.g., FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) *(Colorado II); FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) *(NRWC)*. *Colorado II* upheld FECA's $10,000 per candidate limit on party coordinated expenditures. This Court held that because unlimited committee contributions are funded with private donations they are "tailor-made to undermine contribution limits." 533 U.S. at 464. Accordingly, Congress was entitled to choose to limit these coordinated "expenditures whose special value as expenditures is also the source of their power to corrupt." *Id.* at 464-65.

In 2002, after a period when the amount of political fundraising and spending grew substantially, Congress enacted the Millionaires' Amendment as part of BCRA. Shortly after BCRA became law a number of complaints were filed in the United States District Court for the District of Columbia. One of these constitutional claims was filed by the "Adams plaintiffs" and challenged both the increase in contribution limits and the Millionaires' Amendment as applied to the

United States Senate and House of Representatives.[3] *See McConnell v. FEC*, 540 U.S. 93, 226 (2003).

Citing a lack of standing, this Court dismissed the Adams plaintiffs, none of whom was "a candidate in an election affected by the millionaire provision." *McConnell*, 540 U.S. at 230. This Court rejected their assertion that a purported government interest in equalizing electoral resources provided the Adams plaintiffs with standing to challenge the provisions increasing the limits. *Id.* at 227, 230. This Court stated that, "'[p]olitical "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.'" *Id.* at 227 (*quoting FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1976) (per curiam)).

Addressing the constitutionality of the various contribution limits established by BCRA, *McConnell* reaffirmed that the governmental interest in preventing both the appearance and actuality of corruption serves as the foremost justification for provisions burdening First Amendment freedoms. *See McConnell*, 540 U.S. at 136-37. In 2006, this Court again applied this framework in holding that Vermont's restrictive contribution limits (well under BCRA's current $2,300 limit) violated the First Amendment. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2491-92 (2006).

In assessing the constitutionality of the Millionaires' Amendment in this matter, the three-judge court (Griffith, Circuit Judge, and Kessler and Kennedy, District Judges) bypassed nearly all of this precedent. Entering summary judgment for appellee, the court, in an opinion by Judge Griffith, held that BCRA § 319 violated neither the First

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[3] Neither appellant's complaint nor the district court's opinion in this matter addressed the Millionaires' Amendment provisions applicable to candidates for the United States Senate. *See* App. 1a n.1.

Amendment nor the Equal Protection Clause of the Fifth Amendment.

As a point of departure, the court found that Congress enacted the statute to "correct[] a potential imbalance in resources available to each candidate." App. 9a. The court equated the effect of the increased contribution limits to that of "statutes that permit higher contribution limits for candidates who agree to public financing of campaigns." App. 9a.

Utilizing this framework the court dismissed appellant's claims that the increased limits afforded to his opponent burdened appellant's right of political expression under the First Amendment. App. 9a-17a. Rejecting the claim that self-financed candidates are chilled from exercising free speech, the court pointed to the "voluntary" nature of such expression, App. 12a-13a, and noted that appellant's speech was not "limited in any way." App. 13a. The court relied on *Buckley* and a series of public financing cases to reach this conclusion. It found that any possible harm to appellant stemmed solely from his choice to self-finance: "[T]here is no issue of compulsion here. The Millionaires' Amendment does not create disparities, but rather seeks to reduce them by 'leveling the playing-field' between candidates . . . ." App. 12a. Thus, the court concluded that appellant failed to demonstrate that his speech had been limited. The court also held that the amount of appellant's personal expenditures belied his claim that the statute chilled his speech. App. 13a-14a.

The court next assessed appellant's First Amendment claims regarding the statute's disclosure and notification provisions. Citing to the relevant portions of *Buckley* and *McConnell*, the court rejected appellant's claims regarding the unconstitutionality of these reporting burdens. App. 14a-17a.

The court utilized a similar analysis for appellant's Fifth Amendment Equal Protection Clause claim, concluding that

BCRA § 319 "is an attempt to provide at least a partial remedy for what Congress decided was an unavoidable problem when political opponents for elected office are not similarly situated in their abilities to fund a campaign from their own resources." App. 17a-18a. Again looking to *Buckley's* public financing analysis – and citing a Medicaid decision upholding the constitutionality of "more generous benefits to poor people" – the opinion found no infringement in the statute's disparate treatment of congressional candidates. App. 18a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress vested this Court with direct appellate jurisdiction over the district court's resolution of challenges to BCRA's constitutionality, and asked this Court to "expedite to the greatest possible extent the disposition of the . . . appeal." *See* BCRA § 403(a)(3)-(4). The three-judge district court's decision to reject appellant's constitutional challenges is a clear departure from this Court's jurisprudence relating to FECA and BCRA. Accordingly, this Court should note probable jurisdiction over these issues.

Congress enacted BCRA § 319 after *Buckley's* rejection of FECA's personal expenditure limits, Congress's first foray into "leveling the playing filed." While section 319 does not directly restrict candidates' personal expenditures, it does punish such speakers by providing their contribution-financed opponents with significant electoral benefits. The statute also compels self-financed candidates to make exceptional disclosures regarding their personal expenditures, unlike candidates relying primarily on contributed funds.

The district court held that "leveling the playing field" constituted a legitimate statutory objective for section 319's relaxed contribution limits and other provisions. In so holding, the district court elevated equity – what *Buckley* called an "ancillary interest" – into the sole justification for a statute

that infringes upon core political expression. This approach is unique in the history of campaign finance jurisprudence.

This Court has consistently evaluated contribution restrictions with a view toward the important "interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'" *McConnell*, 540 U.S. at 136 (*quoting NRWC*, 459 U.S. at 208). In assessing the lower boundaries of contribution limits this Court has reaffirmed that this anti-corruption interest is the primary constitutional justification for such restrictions. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388-89 (2000); *Randall*, 126 S. Ct. at 2499-500. Apparently, "leveling the playing field" has never sufficed as the sole governmental justification for the statutory abridgement of core political expression.

In light of this jurisprudence relating to contribution limits (both per candidate and aggregate by donor), coordinated party expenditure limits, and personal expenditure restrictions, a fundamental incongruity pervades the district court's opinion:

It is well-established that addressing corruption serves as the primary justification for campaign finance provisions. In general terms, the present contribution limits constrain political donors' influence and reduce the reality and the appearance of corruption. This Court has repeatedly found that the standard limits enacted by Congress roughly achieve this intended purpose when applied to races between candidates primarily utilizing privately contributed funds. Yet, when candidates rely upon what *Buckley* described as non-corrupting – even ameliorative – personal funds, section 319 authorizes a substantial increase in the authorized amount of contributions and coordinated funds for their opponents. The district court's opinion never explains why a legitimate congressional response to non-corrupting political expression

is the authorization of contributions and expenditures which axiomatically increase the influence of donors and the appearance of corruption. Ignoring this conundrum clouds the legitimacy of all contribution restrictions. If the answer to the corrupting influence of campaign donations is the application of uniform limits, how can the answer to non-corrupting expenditures be found in higher limits made available only to those candidates most susceptible to corruption?

Because section 319 is irreconcilable with the jurisprudence, the district court looked beyond corruption for a legitimate government interest. It found refuge in a purported interest in "'leveling the playing-field' between candidates who are able to spend large amounts of personal wealth on their campaigns and those who cannot." App. 12a.[4] Yet, in rejecting Congress's first attempt to regulate personal expenditures, *Buckley* found this "equalizing" interest to be "ancillary" and "clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." 424 U.S. at 54. Indeed, *McConnell* dismissed a previous challenge to section 319 largely because the asserted right to "equality" was not "legally cognizable" and, therefore, did not provide the appellants with standing. 540 U.S. at 227, 230.

Congress staked out new territory in proffering its concept of equity as a legitimate constitutional justification for section 319. Judicial endorsement of this attempt to engineer the relative levels of candidates' resources would have far-

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[4] In reaching its conclusion, the district court relied upon statements from section 319's legislative backers. App. 2a n.2. Contrary to these assertions, the statute does not engender such a leveling affect in its application. *See infra* pp. 15-17. Moreover, to the extent that these congressional assertions informed the district court's examination of section 319, countervailing statements from the bill's congressional opponents describe the bill as bald incumbency protection. For example, Senator Christopher Dodd stated: "There is simply no way to justify treating an incumbent's war chest differently than a challenger's personal wealth." 147 Cong. Rec. 3195 (2001).

reaching implications. Utilizing this justification, Congress could prescribe regulations to fashion nearly any model of political fairness. If expanding limits to achieve equity in response to personal expenditures is constitutional, then certainly Congress could expand limits in response to the expenditure of contributed funds. There would be no bar to the creation of, say, a "Contributed Millionaire's Amendment," expanding limits for political candidates from minority parties who could not match their opponents' fundraising and spending. Alternatively, Congress could apply this equity rationale to "level the playing-field" among the media or for various types of religious expression.

1. Accepting this equity justification, the district court upheld the constitutionality of BCRA § 319, the so-called Millionaire's Amendment, and rejected appellant's First Amendment and equal protection claims. Because it ignores clear precedent from this Court informing a contrary result, the district court's opinion should be reversed.

a. The district court held that section 319's relaxed contribution limits, abolished coordination limits, and disclosure and notification provisions did not infringe on appellant's First Amendment free speech rights. In so ruling, the Court erroneously relied upon appellate decisions addressing public financing for candidates who voluntary accept financial limitations on their campaigns. App. 9a-10a.

This holding is unique and novel. Appellant believes that no other court has ever applied the rationale for public financing to a case involving the regulation of a candidate's personal expenditures. Specifically, public financing presents a candidate with a constitutionally acceptable *quid pro quo*. Section 319, by contrast, exacts only a *quid*. Appellant's opponent receives these benefits solely because appellant exercised his fundamental First Amendment right to expend personal funds in support of his campaign – a right which Congress *a fortiori* has no ability to curtail. *See Buckley*, 424

U.S. at 51-58. Appellant has not opted out of a public financing regime; he has simply elected to fund his own political expression in a system where private campaign contributions are the norm.

Normally, the provision of public funds by the government is a whole or partial substitute for private contributions and is provided in trade with the candidate for stricter contribution limits and/or expenditure limits. The thrust of public financing is reducing the importance and influence of private contributions. *Buckley*, 424 U.S. at 96. Section 319 subverts these goals. By increasing the funds available to candidates the statute produces the opposite result: more contributed money is available for federal elections and candidates become more dependent on large donations and coordinated party spending.

In relying upon public financing cases, the district court chose to forego more relevant precedent relating to the questions of the statute's constitutionality. Given *Buckley's* determination that personal expenditures constitute core personal expression under the First Amendment, 424 U.S. at 52-53, any benefit conferred to an opponent in response to such speech is highly suspect. Yet, the district court overlooks this issue.

This Court has repeatedly invalidated laws that have, either through taxes or more subtle financial disincentives, attempted to curtail or impermissibly burden speech based on its content. The government may not attach either direct or indirect financial disincentives upon a particular speaker based on the content of that speech. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (striking down law that placed revenues earned from writings of convicted criminals into escrow); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (applying strict scrutiny to statute that singled out magazines and newspapers from generally applicable

gross receipts tax); *cf. Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 593 (1983) (striking down use tax on paper and ink that only fell on newspapers as desire for an "equitable" tax system would not support singling out a small group of newspapers).

Both the contribution limits and the disclosure requirements violate these principles, as they single out appellant and reward his opponent simply because he has chosen to spend his own money on his campaign – for First Amendment purposes, to speak in support of himself. Given the questionable governmental justification for the statute, it is hard to gainsay that section 319 "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quotations omitted).[5]

b. Section 319 violates basics principles of equal protection to the extent that it regulates speech by some candidates but not the speech of other similarly situated candidates. The government's obligation to act neutrally among speakers is found not only in the concept of equal protection, but also in the First Amendment itself. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). As with its First Amendment analysis, the district court's rejection of appellant's equal protection claim violates this Court's decisions construing federal election law under the Equal Protection Clause to the Fifth Amendment.

The district court compared section 319's disparate treatment of appellant's self-financed campaign to the treatment of candidates subject to public financing provisions. App. 18a. The justification for that regime, according to *Buckley*, lay in "eliminating the improper influence of private contribu-

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[5] Indeed, this punishment extends to criminal fines and imprisonment for a "knowing and willful" violation of some of the statute's disclosure provisions. *See* 2 U.S.C. § 437g(d).

tions" and "relieving major-party Presidential candidates from the rigors of soliciting private contributions." *Buckley*, 424 U.S. at 96. Indeed, as the district court's quotation of *Buckley* illustrates, this Court expressly rejected the *Buckley* appellants' argument that public financing violates the Constitution by exacerbating the difference in financial resources to the detriment of minority parties. App. 18a (*quoting Buckley*, 424 U.S. at 97-98 ("[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes.")). The district court's opinion resurrects this justification, incongruously, in upholding a statute created to assist majority party candidates best able to garner large private campaign contributions.

Moreover, the district court obscured the basic distinction between public financing and increased contribution limits. Providing public funds in return for a candidate's voluntary acceptance of a spending ceiling furthers legitimate government interests. No equivalent benefits can be found in expanding contribution limits for a candidate who happens to be in a race with a self-financed opponent. Indeed, section 319 is detrimental to the same government interests that public financing seeks to ameliorate. For example, *Colorado II* identified the corruptive dangers inherent in unlimited party coordinated expenditures and upheld strict limits on such spending. *See* 533 U.S. at 464-65. Yet, a candidate benefiting from section 319 could traduce those limits and benefit from hundreds of thousands of dollars in coordinated party expenditures. *See* 2 U.S.C. § 441a-1(a)(1)(C).

When removed from the context of public finance jurisprudence all justification for BCRA § 319's disparate treatment of candidates disappears. Candidates are not situated differently simply because one of them exercises his First Amendments rights by making personal expenditures. Section 319 violates the Equal Protection Clause because in every applicable circumstance it treats similarly situated candidates

differently and fails to address a compelling state interest. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Judicial approval of this statute would provide Congress with sanction to legislate to its definition of political equity, free of any obligation to justify its discriminatory choices.

2. Even if equalizing resources between candidates constitutes a legitimate government purpose, section 319 fails to create the "level playing-field" Congress purported to advance. By design, section 319 fails to achieve parity for self-financed candidates facing well-funded opponents. Instead, it rewards incumbents and others who have previously amassed large campaign "war chests."

The district court credited various legislative assertions that Congress designed section 319 to correct "a potential imbalance in resources available to each candidate." App. 9a. In uncritically accepting this claim, the district court failed to examine evidence that the statute rewards contribution-financed candidates regardless of the actual difference in resources in any given race.

Indeed, a closer examination reveals that in determining eligibility for increased funds section 319 allows contribution-reliant candidates to distort their financial status in order to avail themselves of the statute's benefits. The statute fosters this type of imbalance because it does not require contribution-financed candidates to account accurately for their campaign finances. Conversely, section 319 requires self-financed candidates to account precisely for their personal expenditures. This approach ignores the realities of contemporary campaign finance.

First, section 319 ignores all private contributions received after December 31 of the year preceding the election. 2 U.S.C. § 441a-1(a)(2)(B)(ii). For a general election race, this excludes ten months of fundraising. Second, even those funds amassed before the end of the preceding year need not be

allocated to the election account for which they will actually be used. *Id.* For example, candidates running without primary opponents may apportion all funds to their primary account, even though the bulk of those funds will actually be used in the general election. *See id.* Finally, the statute halves the amount ultimately reported by the contribution-financed candidate. *See id.* For purposes of section 319, the result is an essentially voluntary reporting system that permits contribution-funded candidates to disclose selectively any amount between $0 and half of the private contributions actually received before the end of the year preceding the election. Section 319 labels this arbitrary amount as the "gross receipts advantage." App. 28a.

The statute compares this gross receipts advantage to a self-financed candidate's personal expenditures to calculate the "opposition personal funds amount" ("OPFA"). App. 27a-28a. This calculation requires self-financed candidates to provide accurate, running accounts of their personal spending through election-day. *See* 2 U.S.C. § 441a-1(b)(1)(C)-(D) (imposing 24-hour reporting requirements for personal expenditures above $10,000). Accordingly, each time self-financed candidates make additional expenditures, their contribution-financed opponents may recalculate their OPFA and raise additional statutory funds. Under section 319, this additional fundraising opportunity is available regardless of the actual difference in funds between opponents at the time of the calculation.

The district court's opinion failed to scrutinize these imbalances. App. 3a-5a. If Congress truly intended to "even the playing field," why does section 319: 1) account for all personal expenditures up to election-day but cut-off reporting of private contributions on December 31 of the preceding year; 2) account for every dollar of personal expenditures, but account for only half of private contributions; and 3) permit candidates to account for funds from campaign "war chests"

intended for use in general elections to primary election accounts? The district court's opinion never takes up any of these questions.

In enacting section 319, Congress paid lip-service to achieving financial "parity." In reality, the statute allows most candidates to use the relaxed limits to exceed greatly their self-financed opponents' personal expenditures. Concurrently, without diminishing any of the statute's benefits, contribution-financed candidates may expend campaign funds that they have accumulated previously and/or raised independently of section 319.

Section 319's statutory formulae reverse the conventional justifications for regulation of campaign funds. The statute treats non-corrupting, personal expenditures as suspect while encouraging significant increases in contributed funds. No circumstance exists where the statute actually achieves the equitable aims ascribed to section 319 by Congress. Accordingly, even if "leveling the playing field" were a constitutional endeavor for Congress, section 319 is not tailored to achieve the stated goal.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 06-01185 (TG)(GK)(HK)
Three-judge Court

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Before: GRIFFITH, *Circuit Judge*; KESSLER, *District Judge*; and KENNEDY, *District Judge*.

MEMORANDUM OPINION

GRIFFITH, *Circuit Judge*:

Plaintiff Jack Davis, the 2006 Democratic Party candidate for New York's 26th District seat in the United States House of Representatives, brings a facial challenge to the so-called "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 ("BCRA "or the "Act"), 2 U.S.C. § 441a-1 (2002), which relaxes limits on the ability of the opponent of a self-financed House candidate to raise money from donors and to coordinate his campaign spending with party committees.[1] Davis argues that the Millionaires' Amendment violates the First Amendment by chilling the speech of self-financed candidates and the Equal Protection Clause of the Fifth

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[1] The Millionaires' Amendment includes a separate and similar (though not identical) provision for elections to the United States Senate. *See* 2 U.S.C. § 441a(i). Davis does not address the BCRA provisions that apply to Senate candidates, nor do we.

Amendment by giving the opponents of self-financed candidates a competitive advantage. Both Davis and the defendant, the Federal Election Commission ("Commission" or "FEC"), have moved for summary judgment. Because we conclude that the Millionaires' Amendment poses no threat to either the First Amendment or the Equal Protection rights of self-financed candidates, we deny Davis's motion for summary judgment and grant the FEC's.

BACKGROUND

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (amending the Federal Election Campaign Act or "FECA, " 2 U.S.C. §§ 431 *et seq.* (1971)), represents Congress's most recent attempt to regulate what it has determined to be the potentially corrupting influence of campaign contributions on our political system. *See McConnell v. FEC*, 540 U.S. 93, 115 (2003) ("BCRA is the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money campaign contributions." (quotation marks omitted)). The Act includes a provision, commonly referred to as the "Millionaires' Amendment," that addresses what Congress deemed an inequity created when the Supreme Court struck down, on First Amendment grounds, FECA's caps on the amount of personal money a candidate could spend on his campaign, but left in place rigid limits on the amount of campaign contributions he could accept from others.[2] *Buckley v. Valeo*, 424 U.S.

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[2] Its purpose, in the words of one of its sponsors, is to counteract the perception that "someone today who is wealthy enough can buy a seat" in Congress. *See* 147 CONG. REC. S2536-02 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine); *see also* 147 CONG. REC. S2536-02 (daily ed. Mar. 20, 2001) (statement of cosponsor Sen. Durbin) ("[I]n America we won't let you buy an election"). Another sponsor explained that it was intended to "mitigate the countervailing risk that [contribution limits] will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections." 148 CONG. REC. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Its sponsors thought it worked to

1, 51-54 (1971). The struck provision had limited Presidential and Vice-Presidential candidates to spending $50,000 of their own money on their campaigns, Senate candidates to $35,000, and most House candidates[3] to $25,000. *Buckley*, 424 U.S. at 51. The Supreme Court left intact provisions that limited persons (other than candidates helping their own campaigns) to contributing a total of $25,000 to all campaigns in a year and $1,000 to any single campaign. The Millionaires' Amendment relaxes the contribution limits for a candidate who faces a wealthy opponent whose personal fortune put towards his bid for office might give him a significant advantage. It also permits a political party to spend more on behalf of the candidate facing a self-financed opponent.

The Millionaires' Amendment mandates that once a self-financed candidate spends more than $350,000 of his personal funds on a campaign, his opponent may be permitted (1) to receive contributions at three times the limit for each donor that would otherwise be in place,[4] 2 U.S.C. § 441a-1(a)(1)(A); (2) to receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations,[5] *id.* § 441a-1(a)(1)(B); and

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"increase free speech [by] giv[ing] the non-wealthy candidate the opportunity to get his or her message out, " without "punish[ing], . . . inhibit[ing], [or] discourag[ing]" the self-financed candidate "from putting in his or her own money." 147 CONG. REC. S2536-02 (daily ed. Mar. 20, 2001) (Sen. DeWine).

[3] A candidate for a House seat in a state with only one Representative was permitted the $35,000 limit.

[4] Contribution limits are adjusted every election cycle to account for changes in the consumer price index. For the current election cycle, donors may not contribute more than $2,300 to a candidate per election. Press Release, Federal Election Commission, FEC Announces Updated Contribution Limits (Jan. 23, 2007), http://www.fec.gov/press/press2007/20070123limits.html.

[5] During an election cycle—beginning January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year—no

(3) to coordinate with their political party on additional party expenditures that would otherwise be limited,[6] *id.* § 441a-1(a)(1)(C). To take advantage of those benefits, the opponent of a self-financed candidate must first calculate the "opposition personal funds amount" ("OPFA") to determine whether he is eligible for relaxed limits on fundraising. *Id.* § 441a-1(a)(1). To calculate the OPFA, the opponent determines the amount of personal funds spent by each candidate *(i.e.,* the self-financed candidate and himself), adds 50% of the total funds raised by each candidate during the year prior to the election, and compares the totals. *Id.* § 441a-1(a)(2). If the opponent's OPFA is above that of the self-financed candidate, he may not take advantage of the relaxed limits and coordinated expenditures. If it is not, then he may take advantage of the relaxed limits, but only until parity is achieved under the OPFA formula. Once each candidate's OPFAs are equal, the Millionaires' Amendment no longer applies, and the opponent of the self-financed candidate cannot take advantage of the relaxed limits on contributions and coordinated expenditures. *Id.* § 441a-1(a)(3)(ii).

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individual may make contributions totaling more than $37,500 to candidates and their authorized committees. Once the Millionaires' Amendment has been triggered, however, individuals who had previously reached the statutory limit on their total contributions may contribute more money to the self-financed candidate's opponent subject to the limitations of 2 U.S.C. § 441a-1(a)(1)(A) (which allows for contributions up to three times the normal limit).

[6] 2 U.S.C. § 441a(d) limits the amount of money the national and state committees of a political party may spend in coordination with the general election campaign of a candidate for federal office. Although these "coordinated expenditures" may be limited, *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001), "independent expenditures" *(i.e.,* expenditures made by a party committee that are not coordinated with the candidate's campaign) made by these same committees may not, *see Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996). The Millionaires' Amendment removes FECA's limits on coordinated expenditures.

The Amendment also changes the reporting requirements for self-financed candidates and their opponents. Each candidate must, within fifteen days of announcing his candidacy, file a Statement of Candidacy with the FEC declaring the amount of personal funds over $350,000 that he intends to spend, if any. *Id.* § 441a-1(b)(1)(B). A candidate who makes or obligates to make expenditures of more than $350,000 in personal funds on his campaign must notify the FEC within twenty-four hours of doing so. *Id.* § 441a-1(b)(1)(C). Once that threshold is crossed, the self-financed candidate must notify the FEC within twenty-four hours of each additional aggregate expenditure of personal funds of $10,000. *Id.* § 441a-1(b)(1)(D). The opponent of a self-financed candidate who takes advantage of the relaxed contribution limits and coordinated party expenditures must notify the FEC and his party within twenty-four hours of receiving contributions and party expenditures that equal 100% of the OPFA. 11 C.F.R. § 400.31(e)(1)(ii). Political parties are also required to notify the candidate and the FEC within twenty-four hours of making any coordinated party expenditures. *Id.* § 400.30(c)(2).

* * *

Jack Davis ran and lost a self-financed campaign as the Democratic nominee for a congressional seat in the 2004 general election. He ran again for the same seat in the 2006 general election. As required by BCRA, on March 23, 2006, he filed his Statement of Candidacy, and declared that he intended to spend no personal funds during the primary campaign for the Democratic Party nomination and $1,000,000 in personal funds during the November general election. On June 6, 2006, Davis filed a facial challenge to the Millionaires' Amendment in this Court. He moved for summary judgment, as did the FEC, and on October 20, 2006, sitting as a three-judge district court, we heard oral argument on both motions. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1331 ("district courts shall have original jurisdiction

of all civil actions arising under the Constitution"). Venue is proper pursuant to § 403 of BCRA ("[t]he action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court") and 28 U.S.C. § 2284 ("a district court of three judges shall be convened when otherwise required by Act of Congress").

DISCUSSION

Although the FEC does not challenge Davis's standing to bring this claim, our independent duty to confirm our authority over each case before us requires that we certify standing "even when not otherwise suggested." *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) (citation omitted). The "irreducible constitutional minimum of standing" consists of three elements: (1) an "injury in fact" that is (2) "fairly . . . trace[able] to the challenged action of the defendant," and (3) "likely . . . redress[able] by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (first alteration in original, internal quotations marks and citations omitted). The Millionaires' Amendment imposes new and added disclosure requirements on self-financed candidates such as Davis, including a declaration of intent to spend more than $350,000 of the candidate's own funds that must be filed within fifteen days of becoming a candidate; an initial notification that the candidate has spent more than $350,000 of his own funds; and additional notifications throughout the campaign for aggregate expenditures in excess of $10,000. 2 U.S.C. § 441a-1(b). These additional disclosure requirements impose an injury-in-fact on self-financed candidates that can be traced directly to the Millionaires' Amendment and that would be removed by a favorable decision from this court. *Cf. Larson v. Valente,* 456 U.S. 228, 241 (1982) (concluding that state's attempt to enforce reporting requirements under Minnesota charitable solicitation statute constituted sufficient injury for standing). Davis there-

fore has standing to challenge the Amendment, and we may turn to the merits of his argument.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law. "*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see also* FED. R. CIV. P. 56. Davis mounts a facial challenge to the constitutionality of the Millionaires' Amendment based upon the First and Fifth Amendments, asking us to "go beyond the facts before [us] to consider whether . . . the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable on its face." *Sanjour v. EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (citation omitted). As the Supreme Court has observed, a facial challenge to legislation is, in general, "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). As-applied challenges, by contrast, seek to "declare the challenged statute or regulation unconstitutional on the facts of the particular case." *Sanjour*, 56 F.3d at 92 n.10. Because of the potentially broad remedial sweep a facial challenge seeks—invalidating the entire statute—it is "manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort," *Nat'l Endowment for the Arts v. Finely*, 524 U.S. 569, 580 (1998) (internal quotation marks omitted).

Davis's facial challenge has two prongs—the First Amendment's protection for freedom of speech and the Fifth Amendment's requirement of equal protection. We examine the two challenges under different modes of analysis. When examining facial challenges, there are "two quite different ways in which a statute or ordinance may be . . . invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'over-

broad.'" *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1312 (D.C. Cir. 2005) (quotation marks and citation omitted). "Although the 'every application' formulation is the general rule, the latter is the rule for facial challenges brought under the First Amendment." *Id.* Because Davis is challenging the Millionaires' Amendment on First Amendment grounds, he need not demonstrate that there are no circumstances under which the amendment would be constitutionally valid, but must show that it "punishes a substantial amount of protected free speech." *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (quotation marks omitted). For other challenges to prevail, including Davis's Fifth Amendment claim, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

To determine whether the Millionaires' Amendment "punishes a substantial amount of free speech" and thus unconstitutionally infringes a candidate's First Amendment rights, we must first determine whether it actually "burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990). The Supreme Court has warned that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign" may create such a burden "because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19.

And so we approach Davis's claim mindful that when Congress legislates to regulate the raising and spending of funds to finance a campaign for elective office, we have a special duty to safeguard core First Amendment values.[7] But

[7] "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection

Davis's First Amendment facial challenge fails at the outset because the Millionaires' Amendment does not "burden[] the exercise of political speech." It places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors. Rather, the Millionaires' Amendment accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .").

The Millionaires' Amendment does not limit in any way the use of a candidate's personal wealth in his run for office. Instead, it provides a benefit to his opponent, thereby correcting a potential imbalance in resources available to each candidate. In this respect, it is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns. This means of regulating the way candidates raise and spend money to pursue elective office has been consistently upheld against First Amendment challenges. *See Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000) (upholding statute that provided public matching funds to candidate participating in public financing scheme when independent expenditures were made against him or on behalf of his non-participating opponent); *Gable v. Patton*, 142 F.3d

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to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (alteration in original); *see also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (quotation marks omitted).

940, 948 (6th Cir. 1998) (where the statute provided 2-1 public matching funds for candidates who agreed to limit campaign expenditures, upholding a provision that waived the expenditure limit when a non-participating opponent raised funds in excess of that amount); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996) (where the statute provided public financing to candidates who agreed to limit overall expenditures, upholding a "waiver" provision that raised the agreed-to expenditure limitation when a privately financed opponent spent in excess of the limit); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding statute that permitted candidates who agreed to accept public funding and limit their expenditures to accept $2,000 contributions, while limiting non-participating opponents to accepting $1,000).

Davis nonetheless argues that the Millionaires' Amendment burdens the free speech rights of wealthy candidates because it discourages them from self-financing their campaigns, which the Supreme Court has held is a form of protected First Amendment speech. *See Buckley*, 424 U.S. at 51-54. According to Davis, candidates who are considering self-financing will be reluctant to do so—a chill on their political speech—because the Millionaires' Amendment will (1) give their electoral opponents a competitive advantage, (2) allow even more "corrupt special interest money" into the system, and (3) burden self-financing candidates with additional reporting provisions and prescribed calculations. We consider each of these arguments in turn.

Davis builds his argument of competitive advantage on a common sense observation about the hardball nature of electoral politics in dicta in a case from the First Circuit: "[B]ecause a head-to-head election has a single victor, *any* benefit conferred on one candidate is the effective equivalent of a penalty imposed on all other aspirants for the same office." *Vote Choice*, 4 F.3d at 38 (emphasis in original). But

recognizing that electoral politics may be a zero-sum game in which a benefit conferred on one candidate is a disadvantage to his opponent fails to address the only issue that might raise constitutional concerns: whether the benefit conferred chills political speech. To prove a First Amendment violation, Davis must demonstrate that a self-financed candidate's speech would be impermissibly chilled, not simply that his opponent would gain some benefit. In fact, the *Vote Choice* case undercuts Davis's argument. The First Circuit rejected a challenge to Rhode Island's public financing statute based on a claim, much like Davis's, that it impermissibly raised the donor limit for candidates who accepted public funds. The First Circuit determined that the statute, which, like the Millionaires' Amendment, provided the benefit of increased contribution limits to the challenging candidate's opponent, was constitutional because it merely "facilitate[d] communication by candidates with the electorate" and "a [non-participating] candidate suffer[ed] no more than a countervailing denial" of the benefit. *Id.* at 3 9 (quotation marks omitted).

Davis is correct to suggest that there may be cases in which a regulatory scheme creates a competitive advantage so extreme that it works an unconstitutional burden on a candidate's First Amendment right to pursue elective office. But no court has found such an unconstitutional burden where the disadvantage is the result of the candidate's choice to fund his campaign from one of several permissible funding sources. In *Buckley,* the Supreme Court upheld expenditure limitations for candidates who chose to participate in public financing of their campaigns. 424 U. S. at 57 n.65. The Court concluded that because the candidate's participation was voluntary, the otherwise impermissible burden on his speech rights passed constitutional muster:

> Congress may engage in public financing of election campaigns and may condition acceptance of public

> funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id.; see also Vote Choice, 4 F.3d at 38 ("[V]oluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes."); *Rosenstiel,* 101 F.3d at1550 ("Because participation is truly voluntary . . . the Appellants' argument that their First Amendment rights are burdened is without merit."); *Republican Nat'l Comm. v. FEC,* 487 F.Supp. 280, 283-86 (S.D.N.Y.) (1980) (three-judge court), *af'd mem.,* 445 U.S. 955 (1980) (holding that the public funding scheme did not burden a candidate's First Amendment rights because it simply provided an additional option for accumulating funds).

It is conceivable that the disadvantage imposed by the statute may be so onerous that the candidate, in effect, has no choice. In such cases, the disadvantage may well create an unconstitutional burden. *See Gable,* 142 F.3d at 948 ("[A]lthough a statutorily created benefit does not per se result in an unconstitutional burden, such benefits could conceivably snowball into a coercive measure upon a non-participating candidate.") (quotation marks omitted); *Vote Choice,* 4 F.3d at 38 ("[T]here is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive."); *Rosenstiel,* 101 F.3d at 1550 ("[T]he State's public financing package does not . . . create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns."). But there is no issue of compulsion here. The Millionaires' Amendment does not create disparities, but rather seeks to reduce them by "leveling the playing-field" between candidates who are able to spend large amounts of personal wealth on their campaigns and those who cannot. Davis pre-

sents no evidence that, or credible explanation why, the Amendment coerces wealthy candidates into foregoing self-financing. Davis has offered no evidence that self-financed candidates are not running for office or choosing not to self-finance or self-financing less because of the Millionaires' Amendment.

Perhaps most significantly of all, he has failed to show that his speech has been limited in any way because of the benefits the Amendment provides his opponent. In fact, Davis himself has *twice* elected to self-finance. We thus conclude that the Millionaires' Amendment does not "stray beyond the pale, . . . becoming impermissibly coercive." *Vote Choice*, 4 F.3d at 38. As Davis himself has shown, whether a candidate incurs the burdens and benefits of the Amendment is entirely his option, and a statute whose application turns on such a choice does not impose an unconstitutional burden on First Amendment rights. *See id.* at 39 ("[W]e have difficulty believing that a statutory framework which merely presents candidates with a voluntary alternative to an otherwise applicable, assuredly constitutional, financing option imposes any burden on [F]irst [A]mendment rights."); *Republican Nat'l Comm.*, 487 F. Supp. at 285 ("[A]s long as the candidate remains free to engage in unlimited private funding and spending . . . the law does not violate the First Amendment rights of the candidate or supporters.").

Davis further claims that he is concerned about the corrupting influence on the electoral process of "special interest money," although he never defines this pejorative term.[8]

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[8] It is not clear to us what Davis means by his reference to "corrupt special interest money," especially in light of his filings with the FEC that report that he accepts contributions to fund his campaign and does not rely entirely on his own money. *See* Jack Davis, Report of Receipts and Disbursements, FEC Form 3, 11 (filed Apr. 14, 2005). Davis never explains why the contributions he accepts are not "corrupting special interest money." It is safe to say that one candidate's "corrupting special interest

Plaintiff's Mem. of Points and Authorities at 24. The Millionaires' Amendment, he argues, has a chilling effect on his speech because it enables "his opponent to partake in a deluge of the same corrupting money that fostered [his] self-financed candidacy in the first instance." *Id.* In other words, a candidate who chooses to self-finance because he abhors the "corrupting influence of special interest money" in the campaign finance system will be reluctant to spend more than $350,000 of his own money because doing so will, from his perspective, further corrupt the system. However, Davis never explains how the fact that his opponent's campaign is funded by "corrupting money" has a chilling effect on his mostly self-financed campaign. In fact, the day Davis filed his Statement of Candidacy with the FEC, he indicated that he planned to spend $1,000,000 of his own money on his campaign. We struggle to see how Davis can credibly argue that his speech has been "chilled" in light of the fact that he has chosen to pay for his campaign and has spent, after all, a considerable amount of his own money in excess of the $350,000 cap. Many a candidate would welcome the opportunity to be similarly "chilled."

We are also not persuaded by Davis's claim that the new and added disclosure requirements on self-financed candidates created by the Millionaires' Amendment burden his First Amendment right to participate freely in political activities. *See* Davis Compl., ¶ 24 (June 28, 2006). The Supreme Court has consistently upheld against First Amendment challenges statutes that impose the burden of reporting campaign finance fundraising and expenditures no less onerous than those that trouble Davis.

In *Buckley,* the Court reviewed the constitutionality of FECA's reporting provisions, which replaced all prior disclo-

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money" may be another candidate's "contributions from devoted supporters who believe in her legislative policies."

sure laws and imposed an entirely new disclosure regime on candidates and "political committees."[9] 424 U.S. at 62. FECA required candidates and political committees to keep detailed contribution and expenditure records including "the name and address of everyone making a contribution in excess of $10, along with the date and amount of the contribution. If a person's contributions aggregate more than $100, his occupation and principal place of business are also to be included." *Id.* at 63. Additionally, each candidate and political committee was to file quarterly reports that contained "detailed financial information" on its contributions and contributors. The Court found "no constitutional infirmities in the recordkeeping reporting, and disclosure requirements of [FECA]. " *Id.* at 84.

In *McConnell,* the Court examined the constitutionality of a provision in BCRA that required a disclosure statement to be filed with the FEC "whenever any person makes disbursements totaling more than $10,000 during any calendar year for the direct costs of producing and airing electioneering communications," 540 U. S. at 194, and "[t]he statement must be filed within twenty-four hours of each 'disclosure date'—a term defined to include the first date and all subsequent dates on which a person's aggregate undisclosed expenses for electioneering communications exceed $10,000 for that calendar year," *id.* at 195. The Court upheld these BCRA reporting provisions, as bothersome as they are, concluding that they were constitutional because they "d[o] not prevent anyone from speaking." *Id.* at 201 (quoting *McConnell v. FEC,* 251 F. Supp. 2d 176, 241 (D.D.C. 2003)) (quotation marks omitted). The challenged reporting provisions of the Millionaires' Amendment do not either.

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[9] FECA defined a "political committee" as "a group of persons that receives contributions or makes expenditures of over $1,000 in a calendar year." *Buckley,* 424 U.S. at 62 (quotation marks omitted).

Because Davis concedes that all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not the Millionaires' Amendment ever applies, his argument that the reporting provisions "impose a significant burden on self-financed candidates and thus, violate the First Amendment," Plaintiff's Mem. of Points and Authorities at 16, is essentially a complaint about the timing elements of the reporting requirements—specifically the twenty-four-hour deadline for reporting aggregate spending of $10,000. But the timing deadlines of the Millionaires' Amendment are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*. The twenty-four-hour deadline for reporting each $10,000 expenditure in excess of $350,000 mirrors the deadline for reporting each $10,000 expenditure on electioneering communications upheld by the *McConnell* Court. 540 U. S. at 194-95.

Davis also complains that the reporting provisions are unconstitutional because they create "a unilateral burden." This argument fares no better than the others. First and foremost, as illustrated above, the reporting provisions do not in fact burden First Amendment speech rights. Moreover, any burden that the reporting provisions may hypothetically impose is not "unilateral." The opponent of a self-financed candidate also faces additional reporting requirements, which are similar to those of the self-financed candidate's. After receiving the self-financed candidate's initial or subsequent notice of expenditures from personal funds, the opposing candidate must, within twenty-four hours, notify the FEC and his political party of the OPFA. 11 C.F.R. § 400.30(b). If the opposing candidate receives increased contributions and increased coordinated party expenditures equal to 100% of the OPFA, the opposing candidate must notify the FEC and his political party within twenty-four hours. *Id.* § 400.31(e)(1)(ii). He must also report when the contributions are Millionaires' Amendment contributions, when he reaches the proportion-

ality cap, and if he ever refunds Millionaires' Amendment contributions. *Id.* Additionally, political parties that make coordinated party expenditures under the Millionaires' Amendment must notify the FEC, as well as the candidate on whose behalf the expenditure was made, within twenty-four hours. *Id.* § 400.30(c)(2).

Finally, we reject Davis's claim that the "substantial and unjustified competitive injury inflicted on self-financed candidates" violates the Equal Protection Clause of the Fifth Amendment. Plaintiff's Mem. of Points and Authorities at 26. The touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats similarly situated entities differently. *See Cal. Med. Ass'n v. FEC,* 453 U.S. 182, 200 (1981) (plurality opinion); *see also Islamic Am. Relief Agency v. Gonzales,* 477 F.3d 728, 736 (D.C. Cir. 2007) (noting that in order "to survive summary judgment [plaintiff] must show that it was treated differently" than a party who is similarly situated).

Davis cannot make this showing because the reasonable premise of the Millionaires' Amendment is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness. Davis, in fact, is situated quite differently from his opponent because he has chosen to finance his campaign with personal wealth, which is subject to no limits, while his opponent has chosen to finance his campaign with contributions that are subject to statutory limits. A candidate like Davis who chooses to self-finance his campaign may have access to funds that are unavailable to an opponent who cannot pay for his campaign personally or chooses not to. In Congress's view, it was this fundamental difference between candidates that posed the problem it sought to address through the Millionaires' Amendment. The Millionaires' Amendment is an attempt to provide at least a

partial remedy for what Congress decided was an unavoidable problem when political opponents for elected office are not similarly situated in their abilities to fund a campaign from their own resources. By trying to reduce such a disparity, Congress does not run afoul of the Equal Protection Clause:

> [T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes. As we said in *Jenness v. Fortson*, "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other . . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ."

Buckley, 424 U.S. at 97-98 (quoting *Jenness v. Fortson*, 403 U.S. 431, 441-442 (1971)) (first ellipsis in original); *see, e.g., Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) (declining to find an equal protection violation in a state Medicaid program which provides more generous benefits to poor people because "in terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same"). We find no Fifth Amendment violation in Davis's claim.

CONCLUSION

For the reasons set forth above, we grant FEC's motion for summary judgment and deny Davis's motion for summary judgment.

This the 9th day of August, 2007.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed August 9, 2007]

Civil Action 06-01185
(Three-Judge Court)

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

JUDGMENT

For the reasons stated in the court's memorandum opinion docketed this same day, it is this 9th day of August, 2007, hereby

ORDERED that JUDGMENT is entered in favor of defendant and against plaintiff.

Thomas B. Griffith
United States Circuit Judge

Gladys Kessler
United States District Judge

Henry H. Kennedy, Jr.
United States District Judge

APPENDIX C

UNITED STATES CONSTITUTION

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * * *

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES

2 U.S.C. § 437g. Enforcement

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

* * * *

2 U.S.C § 441a-1. Modification of certain limits for House candidates in response to personal fund expenditures of opponents

(a) Availability of increased limit

(1) In general

Subject to paragraph (3), if the opposition personal funds amount with respect to a candidate for election to the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds $350,000—

(A) the limit under subsection (a)(1)(A) with respect to the candidate shall be tripled;

(B) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under subparagraph (A) during a period in which the candidate may accept such a contribution; and

(C) the limits under subsection (d) with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

(2) Determination of opposition personal funds amount

(A) In general

The opposition personal funds amount is an amount equal to the excess (if any) of—

(i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1) of this section) that an opposing candidate in the same election makes; over

(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

(B) Special rule for candidate's campaign funds

(i) In general

For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A), such amount shall include the gross receipts advantage of the candidate's authorized committee.

(ii) Gross receipts advantage

For purposes of clause (i), the term gross receipts advantage means the excess, if any, of—

(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

(3) Time to accept contributions under increased limit

(A) In general

Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1)—

(i) until the candidate has received notification of the opposition personal funds amount under subsection (b)(1) of this section; and

(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 100 percent of the opposition personal funds amount.

(B) Effect of withdrawal of an opposing candidate

A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

(4) Disposal of excess contributions

(A) In general

The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the in-

creased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

(B) Return to contributors

A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

(b) Notification of expenditures from personal funds

(1) In general

(A) Definition of expenditure from personal funds

In this paragraph, the term expenditure from personal funds means—

(i) an expenditure made by a candidate using personal funds; and

(ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(B) Declaration of intent

Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed $350,000.

(C) Initial notification

Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of

$350,000 in connection with any election, the candidate shall file a notification.

(D) Additional notification

After a candidate files an initial notification under subparagraph (C), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds $10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

(E) Contents

A notification under subparagraph (C) or (D) shall include—

(i) the name of the candidate and the office sought by the candidate;

(ii) the date and amount of each expenditure; and

(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(F) Place of filing

Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with—

(i) the Commission; and

(ii) each candidate in the same election and the national party of each such candidate.

(2) Notification of disposal of excess contributions

In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the

candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under subsection (a) of this section) and the manner in which the candidate or the candidate's authorized committee used such funds.

(3) Enforcement

For provisions providing for the enforcement of the reporting requirements under this subsection, see section 437g of this title.

BCRA § 319, 116 Stat. at 109-12

SEC 319. MODIFICATION OF INDIVIDUAL CONTRIBUTION LIMITS FOR HOUSE CANDIDATES IN RESPONSE TO EXPENDITURES FROM PERSONAL FUNDS,

(a) Increased Limits.—Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by inserting after section 315 the following new section: modification of certain limits for house candidates in response to personal fund expenditures of opponents Sec. 315A. (a) Availability of Increased Limit.—

(1) In general.—Subject to paragraph (3), if the opposition personal funds amount with respect to a candidate for election to the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds $350,000—

(A) the limit under subsection (a)(1)(A) with respect to the candidate shall be tripled;

(B) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under subparagraph (A) during a period in which the candidate may accept such a contribution; and (C) the limits under subsection (D) with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

(2) Determination of opposition personal funds amount.—

(A) In general.—The opposition personal funds amount is an amount equal to the excess (if any) of—

(i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1)) that an opposing candidate in the same election makes; over

(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

(B) Special rule for candidate's campaign funds.—

(i) In general.—For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A), such amount shall include the gross receipts advantage of the candidate's authorized committee.

(ii) Gross receipts advantage.—For purposes of clause (i), the term 'gross receipts advantage' means the excess, if any, of—

(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

(3) Time to accept contributions under increased limit.—

(A) In general.—Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1)—

(i) until the candidate has received notification of the opposition personal funds amount under subsection (b)(1); and

(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 100 percent of the opposition personal funds amount.

(B) Effect of withdrawal of an opposing candidate.—

A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

(4) Disposal of excess contributions.—

(A) In general.—

The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

(B) Return to contributors.—

A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

(b) Notification of Expenditures From Personal Funds.—

(1) In general.—

(A) Definition of expenditure from personal funds.—

In this paragraph, the term 'expenditure from personal funds' means—

(i) an expenditure made by a candidate using personal funds; and

(ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(B) Declaration of intent.—

Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed $350,000.

(C) Initial notification.—

Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of $350,000 in connection with any election, the candidate shall file a notification.

(D) Additional notification.—

After a candidate files an initial notification under subparagraph (C), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds $10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

(E) Contents.—A notification under subparagraph (C) or (D) shall include—

(i) the name of the candidate and the office sought by the candidate,

(ii) the date and amount of each expenditure; and

(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(F) Place of filing.—

Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with—

(i) the Commission; and

(ii) each candidate in the same election and the national party of each such candidate.

(2) Notification of disposal of excess contributions.—

In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under subsection (a)) and the manner in which the candidate or the candidate's authorized committee used such funds.

(3) Enforcement.—For provisions providing for the enforcement of the reporting requirements under this subsection, see section 309.

(b) Conforming Amendment.—Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a), as amended by section 304(a), is amended by striking subsection (i), and inserting subsection (i) and section 315A.

* * * *

BCRA § 403(a), 116 Stat. at 113-14

SEC. 403. JUDICIAL REVIEW

(a) Special Rules for Actions Brought on Constitutional Grounds.—

If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No: 1:06cv01185
(TG)(GK)(HK)
THREE-JUDGE COURT

JACK DAVIS

Plaintiff,

v.

FEDERAL ELECTION COMMISSION

Defendant.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jack Davis, plaintiff in the above-named case, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge district court, dismissing the complaint entered in this action on August 9, 2007.

This appeal is taken pursuant to Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the final decision of a three-judge district court).

Dated this 16th day of August, 2007.

Respectfully submitted,

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MOTION

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33 pgs

No. 07-320

12-04-07

In the Supreme Court of the United States

JACK DAVIS, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 109, applies to elections for the United States House of Representatives in which a candidate spends more than $350,000 in personal funds. In such an election, when certain conditions are met, Section 319 modifies the contribution and coordinated-expenditure limits that would otherwise apply to the self-financing candidate's opponent, and it imposes certain disclosure requirements on all candidates in such elections. The questions presented are as follows:

1. Whether appellant has standing to challenge the modified contribution and coordinated-expenditure limits established by Section 319.

2. Whether those modified limits on their face violate the First Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment.

3. Whether the disclosure requirements established by Section 319 are unconstitutional on their face.

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In the Supreme Court of the United States

No. 07-320

JACK DAVIS, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the district court (J.S. App. 1a-18a) is reported at 501 F. Supp. 2d 22.

JURISDICTION

The decision of the district court was issued on August 9, 2007. A notice of appeal was filed on August 16, 2007, and the jurisdictional statement was filed on September 7, 2007. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114; and 28 U.S.C. 1253.

STATEMENT

This case involves a facial constitutional challenge to Section 319 of BCRA, 116 Stat. 109 (2 U.S.C. 441a-1 (Supp. V 2005)). Section 319 applies to elections for the

United States House of Representatives in which a candidate contributes more than $350,000 in personal funds to his own campaign. If and when certain conditions are met, the opponents of such candidates may accept contributions from individuals in excess of the generally applicable limits. See 2 U.S.C. 441a-1(a)(1)(A)-(B) (Supp. V 2005). Under those circumstances, the usual statutory limits on political party expenditures that are coordinated with a candidate do not apply to expenditures in support of an opponent of the self-financing candidate. See 2 U.S.C. 441a-1(a)(1)(C) (Supp. V 2005). Appellant filed suit in federal district court, arguing that Section 319 on its face violates the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The three-judge district court rejected appellant's constitutional claims and granted the government's motion for summary judgment. J.S. App. 1a-18a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. V 2005); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Federal law has long prohibited any person from making contributions "to any candidate and his autho-

rized political committee with respect to any election for Federal office which, in the aggregate, exceed" a statutory cap, which is currently set at $2300. 2 U.S.C. 441a(a)(1)(A) (2000 & Supp. V 2005); see J.S. App. 3a n.4. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the $1000 contribution limit then imposed by FECA. See *id.* at 23-35. The Court explained that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26. In response to the contention that the contribution limit had been set at too low a level, the Court in *Buckley* stated that "if [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30 (citations and internal quotation marks omitted). Because expenditures made in coordination with candidates have essentially the same value to candidates as contributions, federal law has also long treated "coordinated expenditures"—including expenditures by political parties made in coordination with their own candidates, *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001)—as "contributions" subject to statutory limits, see *Buckley*, 424 U.S. at 46-47 & n.53.

While upholding statutory limits on contributions *to* federal candidates, the Court in *Buckley* invalidated FECA caps on the amount of personal wealth a federal candidate could spend on his own campaign. 424 U.S. at 51-54. Those provisions barred presidential and vice-presidential candidates from spending more than

$50,000 of their personal wealth on their campaigns, limited Senate candidates to $35,000, and limited most House candidates to $25,000. *Id.* at 51. The Court concluded that "the First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

The Court in *Buckley* upheld Congress's decision to provide public financing for presidential campaigns and to make the availability of public money contingent on a candidate's agreement to adhere to statutory expenditure limitations. 424 U.S. at 57 n.65, 92-93. Unlike mandatory expenditure caps, the Court concluded, such an arrangement does not "abridge, restrict, or censor speech," but instead "facilitate[s] and enlarge[s] public discussion and participation in the electoral process." *Id.* at 92-93. The Court explained that, "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n.65.

3. The Court in *Buckley* recognized that, "[g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court acknowledged, however, that this relationship "may not apply where the candidate devotes a large amount of his personal resources to his campaign." *Id.* at 56 n.63. Based on its assessment of federal elections in the thirty years since *Buckley*, Congress determined that increasing numbers of congressional candidates now choose to rely largely on their own personal wealth to finance their campaigns.

In the debates that culminated in BCRA's enactment, Members of Congress identified various harmful consequences that could follow from the increasing impact of candidates' personal wealth on elections for federal office. The disparity in campaign resources created by wealthy candidates' expenditures of personal funds was thought to "ma[k]e it more difficult for non-wealthy opponents to compete and to put their messages and their ideas across to the public." 147 Cong. Rec. 3967 (2001) (Sen. DeWine); see 148 Cong. Rec. 1382 (2002) (Rep. Davis) (explaining that Section 319 "evens the playing field" between a non-wealthy candidate and one "who can go to McDonald's, have breakfast with himself, write himself a $3 million check and have the largest fund-raising breakfast in history"). The competitive advantage of self-financing candidates in turn threatened to create the public perception that "someone today who is wealthy enough can buy a seat" in Congress. 147 Cong. Rec. at 3976 (Sen. DeWine). Members of Congress also expressed concern that party officials increasingly consider individuals' wealth in recruiting potential candidates. See, *e.g.*, *id.* at 3969 (Sen. McCain) ("[B]oth parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate.").

To address those phenomena, Congress enacted Section 319 of BCRA, which applies to elections for the United States House of Representatives.[1] Section 319

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[1] Section 304 of BCRA, 116 Stat. 97 (2 U.S.C. 441a(i) (Supp. V 2005)), contains comparable provisions and applies to elections for the United States Senate. Section 304 is not at issue in this case. See J.S. App. 1a n.1; J.S. 6 n.3. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), certain plaintiffs challenged the constitutionality of Sections 304 and 319, but the

applies only to House election campaigns in which at least one candidate spends more than $350,000 in personal funds. For purposes of determining whether the $350,000 threshold has been crossed, the term "expenditure from personal funds" includes "an expenditure made by a candidate using personal funds," 2 U.S.C. 441a-1(b)(1)(A)(i) (Supp. V 2005), as well as "a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee," 2 U.S.C. 441a-1(b)(1)(A)(ii) (Supp. V 2005).

If a candidate for the House of Representatives makes expenditures from personal funds that exceed $350,000,

> his opponent may be permitted (1) to receive contributions at three times the limit for each donor that would otherwise be in place; (2) to receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations; and (3) to coordinate with their political party on additional party expenditures that would otherwise be limited.

J.S. App. 3a-4a (footnotes and citations omitted); see 2 U.S.C. 441a-1(a)(1)(A)-(C) (Supp. V 2005). To determine whether and to what extent he may accept contributions and coordinated expenditures that would otherwise exceed the statutory limits, a candidate must calculate the "opposition personal funds amount" (OPFA). See 2 U.S.C. 441a-1(a)(2) (Supp. V 2005); J.S. App. 4a.[2] Sec-

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Court held that the plaintiffs lacked standing to sue and accordingly did not reach the merits of their challenge. See *id.* at 229-230.

[2] The formula used to calculate the OPFA during the election year counts the expenditures from personal funds made by each candidate,

tion 319 limits the amount of increased contributions and increased coordinated party expenditures a candidate may receive to 100% of the amount of the total OPFA disparity between the candidates. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005).

Section 319 also imposes reporting requirements for self-financing candidates and their opponents. See J.S. App. 5a. Within 15 days after becoming a candidate, an individual must disclose the amount of personal funds in excess of $350,000 that he intends to spend during the campaign. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005). If a candidate actually spends more than $350,000 in personal funds on his campaign, he must file an "initial notification" of that expenditure within 24 hours after exceeding the threshold. 2 U.S.C. 441a-1(b)(1)(C) (Supp. V 2005). Thereafter, for each aggregate expenditure of $10,000 or more in personal funds, the candidate must file a notification within 24 hours. 2 U.S.C. 441a-1(b)(1)(D) (Supp. V 2005). Those notifications must be filed with the Commission and provided to each oppo-

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adds 50% of the aggregate receipts raised by each candidate during the year prior to the election, and compares the totals. 2 U.S.C. 441a-1(a)(2) (Supp. V 2005). Only if the opponent has raised and spent $350,000 less of those funds than the self-financing candidate will he qualify to solicit additional financial support under the provision. The provision applies equally to all candidates, so that even a self-financing candidate can qualify to raise extra funds if he is running against a self-financing opponent who has raised and spent even more under the OPFA formula. The portion of the formula that takes into account a candidate's aggregate receipts during the non-election year—titled the "gross receipts advantage" provision—was added so that incumbents who raise a substantial amount of contributions in the year before an election year will not unduly benefit. See 147 Cong. Rec. at 5148 (Sen. Durbin) (explaining that Congress's goal was to "get as close [as] possible to a level playing field but not create incumbent advantage").

nent in the same election, and to the national party of each opponent. 2 U.S.C. 441a-1(b)(1)(F) (Supp. V 2005).

The opponent of a self-financing candidate is also subject to additional real-time reporting requirements. See 11 C.F.R. 400.30-400.31. After receiving the self-financed candidate's initial or additional notifications of expenditures from personal funds, the opposing candidate must calculate the current OPFA and, if and when he becomes eligible to invoke the modified contribution and coordinated-expenditure limits, must notify the Commission and his political party within 24 hours. 11 C.F.R. 400.30(b). If the opposing candidate reaches the maximum allowable amount and is no longer entitled to solicit increased contributions and coordinated party expenditures, he must notify the Commission and his political party within 24 hours. 11 C.F.R. 400.31.

4. Appellant Jack Davis was a candidate for United States Representative in New York's 26th Congressional District in both 2004 and 2006. J.S. App. 5a. In the spring of 2006, appellant filed with the Commission a Statement of Candidacy indicating that he intended to spend no personal funds in support of his primary campaign and to spend $1 million in personal funds during the general election campaign. *Ibid.*[3] In June 2006, appellant filed suit in federal district court, asserting a

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[3] Appellant ultimately loaned his campaign committee $2,257,280 in 2006, including $1,520,000 for the general election. See *Davis for Congress, Report of Receipts and Disbursements* 4 (Mar. 10, 2007) <http://images.nictusa.com/cgi-bin/fecimg/?F27930238050> (reporting $2,257,280 in candidate loans in the 2006 election cycle); *Davis for Congress, 24-Hour Notice of Expenditure from Candidate's Personal Funds* (Nov. 6, 2006)<http://images.nictusa.com/cgi-bin/fecimg/?_26960663096+0> (reporting $1,520,000 in total expenditures from personal funds in the general election).

facial challenge to Section 319. *Ibid.* Pursuant to Section 403(a)(1) of BCRA, 116 Stat. 114, a three-judge district court was convened. See J.S. App. 1a, 6a. The district court granted the FEC's motion for summary judgment. *Id.* at 1a-18a.

a. The district court held that appellant had standing to sue. J.S. App. 6a-7a. The court explained that Section 319 "imposes new and added disclosure requirements on self-financed candidates such as [appellant]." *Id.* at 6a. The court concluded that "[t]hese additional disclosure requirements impose an injury-in-fact on self-financed candidates that can be traced directly to [Section 319]." *Ibid.*

b. The district court noted that appellant had brought a facial challenge to Section 319, and that such a suit is "the most difficult challenge to mount successfully." J.S. App. 7a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The district court held that appellant's facial challenge "fails at the outset" because Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." *Id.* at 9a. Rather, the district court explained, Section 319 "preserve[s] core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace." *Ibid.* The court observed that Section 319 "is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns," and that such regimes have "been consistently upheld against First Amendment challenges." *Ibid.*; see *id.* at 9a-10a (citing cases).

The district court rejected appellant's contention that Section 319, by conferring a competitive advantage on opponents of self-financing candidates, will impermissibly deter candidates for the House of Representatives from financing their own campaigns. See J.S. App. 10a-13a. The court acknowledged that "there may be cases in which a regulatory scheme creates a competitive advantage so extreme that it works an unconstitutional burden on a candidate's First Amendment right to pursue elective office." *Id.* at 11a. The court observed, however, that "no court has found such an unconstitutional burden where the disadvantage is the result of the candidate's choice to fund his campaign from one of several permissible funding sources." *Ibid.* The court noted in that regard that this Court in *Buckley* had "upheld expenditure limitations for candidates who chose to participate in public financing of their campaigns." *Ibid.* (citing 424 U.S. at 57 n.65); see p. 4, *supra*. The court further explained that appellant himself had not been deterred by Section 319, since he had chosen to self-finance his campaigns in both 2004 and 2006. See J.S. App. 13a.

c. The district court also rejected appellant's challenge to the disclosure requirements imposed by Section 319. J.S. App. 14a-17a. The court noted that this Court had upheld similar reporting obligations both in *Buckley* and in *McConnell* v. *FEC*, 540 U.S. 93, 194-195 (2003). J.S. App. 14a-15a. The court explained that, "[b]ecause [appellant] concedes that all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not [Section 319] ever applies," appellant's claim of an unconstitutional burden "is essentially a complaint about the timing elements of the reporting requirements." *Id.* at 16a. The court

found that complaint to be unfounded, noting that "the timing deadlines of [Section 319] are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." *Ibid.* The court further observed that Section 319 imposes reporting obligations not only on self-financing candidates, but also on their opponents and on political parties. *Id.* at 16a-17a.

d. The district court rejected appellant's equal protection claim as well. J.S. App. 17a-18a. The court explained that "[t]he touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats similarly situated entities differently." *Id.* at 17a. The court held that appellant "cannot make this showing because the reasonable premise of [Section 319] is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." *Ibid.*

5. While this case was pending before the three-judge district court, appellant lost the 2006 general election. His opponent, Congressman Thomas Reynolds, did not receive any increased contributions or coordinated party expenditures pursuant to Section 319. See *Reynolds for Congress Disclosure Reports* (visited Dec. 4, 2007) <http://images.nictusa.com/cgi-bin/fecimg/?C00336065> (reporting no increased contributions to Congressman Reynolds or coordinated party expenditures on his behalf pursuant to Section 319 in the 2006 election cycle).

ARGUMENT

Appellant contends that Section 319's relaxed contribution and coordinated-expenditure limits for opponents of self-financed candidates on their face violate his rights under the First Amendment and under the equal protection component of the Fifth Amendment. Appellant lacks standing to raise those claims, since he has identified no actual or imminent injury to himself resulting from that aspect of Section 319. In any event, the district court correctly held that those facial challenges lack merit. Appellant's challenge to the disclosure requirements of Section 319 also presents no substantial federal question on the merits. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the court of appeals should be affirmed.

1. In order to satisfy the "irreducible constitutional minimum" of Article III standing, appellant must establish (1) an injury-in-fact that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Insofar as appellant challenges Section 319's modifications of the generally applicable limits on contributions and party coordinated expenditures, he cannot satisfy Article III's "injury in fact" requirement. Appellant has not shown that Section 319 caused him any "concrete and particularized injury" in the past, or that any such injury is imminent.

During the 2006 election campaign, appellant's opponent received no contributions, and the opponent's political party made no coordinated expenditures, in excess

of the generally applicable FECA limits. See p. 11, *supra*. The possibility that his opponent would invoke the modified limits established by Section 319 did not deter appellant from loaning his campaign approximately $2.25 million in 2006. See note 3, *supra*; J.S. App. 14a ("We struggle to see how [appellant] can credibly argue that his speech has been 'chilled' in light of the fact that he has chosen to pay for his campaign and has spent, after all, a considerable amount of his own money in excess of the $350,000 cap."). Although the election campaign had not ended at the time of the summary judgment briefing in the lower court, it is now clear that appellant suffered no injury from Section 319's modification of some of the statutory limits on financial support for candidates.

By the time that the district court issued its decision in this case, the 2006 election had taken place. Because Article III's "case-or-controversy requirement subsists through all stages of federal judicial proceedings," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990), the possibility that this case has become moot would present another potential obstacle to its adjudication by this Court, even if appellant had initially established his standing to sue. If appellant had been injured during the 2006 campaign by the relaxed contribution and coordinated-expenditure limits contained in Section 319, the prospect that appellant will self-finance a future federal electoral campaign would likely bring this case within "the established exception to mootness for disputes capable of repetition, yet evading review." *FEC* v. *Wisconsin Right to Life*, 127 S. Ct. 2652, 2662 (2007); see *id.* at 2662-2663. The fact that the events precipitating the parties' dispute are "capable of repetition," however, provides no basis for concluding that appellant will

be injured in future election cycles in light of the reality that he did *not* suffer any injury in the most recent campaign. Appellant's First Amendment and equal protection challenges to Section 319's modified contribution and coordinated-expenditure limits are therefore nonjusticiable.

2. Section 319's modified limits on financial support for the opponents of self-financing candidates do not violate the First Amendment and certainly do not do so on their face.

a. Appellant characterizes the instant case as one "involving the regulation of a candidate's personal expenditures." J.S. 11. As the district court recognized, however, Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." J.S. App. 9a. In short, as the district court explained, Section 319 "does not limit in any way the use of a candidate's personal wealth in his run for office." *Ibid.* Section 319 therefore is not naturally described as "regulation" of a self-financing candidate's campaign-related activities.

b. The principal thrust of appellant's First Amendment argument is that (i) because appellant has a constitutional right to make unlimited expenditures in support of his own campaign, he cannot be penalized for exercising that right; and (ii) because an election can have only one winner, any benefit provided to his opponent should be regarded for constitutional purposes as a penalty imposed on appellant. That line of reasoning cannot be reconciled with *Buckley* (whose validity appellant does not question). The Court held in that case that, although the First Amendment precludes Congress from placing

binding limits on a candidate's independent campaign expenditures, Congress "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. The obvious consequence of that holding is that a candidate's insistence on spending personal funds in amounts exceeding the statutory threshold may legitimately be treated as a ground for withholding a federal subsidy to which the candidate would otherwise be entitled.

The Court in *Buckley* thus recognized that a candidate's First Amendment right to make unlimited campaign expenditures is not violated simply because the candidate is subjected to some practical disadvantage as a result of exercising that right.[4] The disadvantage to which self-financing presidential candidates are subjected—*i.e.*, the denial of federal funds that would otherwise be paid to the candidate himself—is much more direct and immediate than the competitive injury that appellant claims he would suffer if his opponent were enabled to raise greater amounts of money. If, as *Buckley* holds, use of a self-financing presidential candidate's spending decisions as a ground for withholding

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[4] Appellant contends (J.S. 12) that "[t]he government may not attach either direct or indirect financial disincentives upon a particular speaker based on the content of that speech." The application of Section 319, however, does not turn on the content of a candidate's speech, but on the amount of personal funds expended. This Court's decision in *Buckley* makes clear that Congress may create "financial disincentives" to independent campaign spending without violating the Constitution. The cases on which appellant relies (see J.S. 12-13), moreover, all involved extractions of funds directly from persons engaged in First Amendment activity. Section 319, by contrast, neither deprives the self-financing candidate of funds nor divests him of any other potential benefit; it simply loosens the fundraising restrictions placed upon his opponents.

federal money from that candidate does not unconstitutionally burden the candidate's First Amendment rights, there is no basis (especially in the context of a facial challenge such as this) for treating the modification of limits on an opponent's fundraising as a constitutional violation.

c. As the district court recognized, Congress enacted Section 319 to reduce the natural advantage that wealthy individuals possess in campaigns for federal office. J.S. App. 2a-3a n.2; see p. 5, *supra*. The Court in *Buckley* explained that, under the FECA contribution limits, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court viewed this as a healthy byproduct of the contribution limits it upheld. The Court also noted, however, that, in light of the Court's invalidation of expenditure limits, "[t]his normal relationship may not apply where the candidate devotes a large amount of his personal resources to his campaign." *Id.* at 56 n.63. In enacting Section 319, Congress sought partially to restore the "normal relationship" between the resources that a candidate can acquire through private contributions and the level of public support that the candidate has mustered. Section 319 also serves to counteract the public perception that wealthy people can buy seats in Congress, to increase the incentives for less wealthy candidates to run for office, and to encourage political parties to recruit candidates based on merit, rather than personal financial wherewithal. See p. 5, *supra*.

Nothing in this Court's decisions supports appellant's suggestion (see J.S. 10-11) that the equalization (or relative equalization) of electoral opportunities for

wealthy and non-wealthy candidates is an illegitimate governmental objective. To be sure, the Constitution limits the *means* that Congress may employ to achieve that goal. Thus, the Court in *Buckley* held that the "interest in equalizing the relative financial resources of candidates competing for elective office" was a constitutionally insufficient justification for restrictions on a candidate's own campaign spending. 424 U.S. at 54. That holding, however, was based not on doubt as to the legitimacy of the relevant government interest, but on the conclusion that "the First Amendment simply cannot tolerate [the spending cap's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Ibid.* Section 319, by contrast, reflects Congress's effort to achieve the same objective *without* limiting the self-financing candidate's freedom of expression, in a manner calculated to *increase* the volume of campaign-related speech. And Congress chose to do so by *relaxing* contribution and coordinated-expenditure limits that themselves trigger First Amendment scrutiny.

d. Appellant contends (J.S. 9-10) that, because Section 319 permits opponents of self-financing candidates to accept contributions in excess of the generally applicable FECA limit, it is inconsistent with the anti-corruption rationale on which those limits have been sustained. That claim lacks merit.

In setting and later adjusting the FECA limit on individual contributions, Congress has sought to prevent the actual or apparent corruption that large contributions might engender, while ensuring that candidates can obtain the resources needed to run effective campaigns. As this Court has recognized, the task of identifying the specific dollar limit that strikes the most ap-

propriate balance between those objectives is largely entrusted to Congress. See *Buckley*, 424 U.S. at 30 (explaining that, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000") (citation omitted); accord *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000). The modified contribution and coordinated-expenditure limits contained in Section 319 do not reflect congressional abandonment of FECA's anti-corruption purpose. Rather, they reflect Congress's determination to adjust the balance in a subset of elections to address an additional legitimate interest that is distinctly raised in that subset. Specifically, Congress determined that, for elections in which a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support, the fundraising limits applicable to opposing candidates should take into account the distinct public interest in equalizing electoral opportunities for wealthy and non-wealthy individuals. As Senator McCain explained:

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. Section [319] does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election.

148 Cong. Rec. at 3603.[5]

Nothing in this Court's decisions suggests that Congress is foreclosed from adjusting the statutory contribution and coordinated-expenditure limits for particular elections in which one candidate's large expenditures of personal wealth implicate a government interest distinct from those that underlie the generally applicable caps. Cf. *Buckley*, 424 U.S. at 36 (explaining that FECA "provisions [excepting some volunteers' expenses from contribution limits] are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates"). Such accommodation of competing interests is the norm rather than the exception in legislation, and "[c]ourts * * * must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002) (citation omitted). As this Court has explained,

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[5] Section 319 was carefully crafted to target the problems that Congress identified without unduly burdening or benefitting either self-financing candidates or their opponents. The provision does not apply to all self-financing candidates, but only to those who spend more than $350,000 on their own campaigns. Section 319 caps the amount of increased contributions and coordinated party expenditures that an opponent may accept, and thus in most circumstances prevents an opponent from raising more in additional funds under the provision than the self-financing candidate's expenditures of personal funds on his own campaign. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005). In addition, the opponents of self-financing candidates remain subject to substantial statutory fundraising restrictions that help to reduce the possibility of corruption or the appearance thereof. Section 319 does not affect the contribution restrictions on corporations, labor unions, foreign nationals, or political committees, and it relaxes but does not eliminate the limits on contributions by individuals.

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987).[6]

e. The courts of appeals have consistently rejected First Amendment challenges to campaign-finance statutes similar to Section 319, including statutes that permit increased contribution limits for certain qualifying candidates, on the ground that such laws do not restrict the speech of opposing candidates. See *Daggett* v. *Committee on Gov't Ethics & Election Practices*, 205 F.3d 445, 464-465 (1st Cir. 2000) (upholding statute that provided public matching funds to candidate who accepted public financing when independent expenditures were made against him or on behalf of non-participating opponent; court explained that the matching funds provision "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures"); *Gable* v. *Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (upholding statute that provided 2-1 public matching funds for candidates who agreed to limit expenditures and that waived the expenditure limit

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[6] Nor is it obvious why Congress's use of higher limits in this one context would lead to invalidation of the higher limits imposed by Section 319, as opposed to calling into question whether the basic limits are "too low." Appellant does not make the latter challenge, and it is foreclosed by precedent.

when a non-participating opponent raised funds in excess of that amount; court explained that "a statutorily created benefit does not per se result in an unconstitutional burden") (internal quotation marks omitted), cert. denied, 525 U.S. 1177 (1999); *Rosentiel* v. *Rodriquez*, 101 F.3d 1544, 1551 (8th Cir. 1996) (upholding statute that provided public financing to candidates who agreed to limit overall expenditures and that raised the expenditure limit when a privately-financed opponent spent in excess of the limit); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 37 n.13, 39 (1st Cir. 1993) (upholding statute that permitted candidates who agreed to public financing and to limit their expenditures to accept contributions of $2000, while limiting non-participants to $1000 contributions). But cf. *Day* v. *Holahan*, 34 F.3d 1356, 1359-1362 (8th Cir. 1994) (striking down state law that increased a candidate's expenditure limits *and* provided the candidate with public funds when any person made independent expenditures in support of the candidate's opponent).[7]

3. Appellant's equal protection claim would present no substantial federal question even if appellant had standing to contest Section 319's modifications of the contribution and coordinated-expenditure limits that apply to his opponent. Appellant contends (J.S. 13) that

[7] Unlike the state law at issue in *Day*, Section 319 is triggered only by substantial expenditures of personal funds made by the candidate himself, not by independent expenditures made by the candidate's supporters. Also unlike the law struck down in *Day*, Section 319 does not make public funds available to the opponent of a self-financing candidate. Two years after its decision in *Day*, the Eighth Circuit upheld against First Amendment challenge a state law under which a candidate's own expenditures above a threshold amount triggered the elimination of limits on his publicly-financed opponent's campaign spending. See *Rosenstiel*, 101 F.3d at 1551-1552.

"Section 319 violates basic principles of equal protection to the extent that it regulates speech by some candidates but not the speech of other similarly situated candidates." As the district court explained, however, "the reasonable premise" underlying Section 319 is that candidates who spend more than $350,000 of their own money on a House campaign are "situated differently from those who lack the resources to fund their own campaigns." J.S. App. 17a.

The Court in *Buckley* held that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." 424 U.S. at 97. The Court rejected equal protection challenges to the FECA criteria used to determine whether and to what extent various presidential candidates would receive public funding. *Id.* at 97-108. And, as explained above, the Court held that public funds could be denied to any candidate who refused to abide by statutory spending limits. That holding establishes that, while Congress may not *require* compliance with statutory spending caps, it may permissibly treat candidates who adhere to such limits differently from those who decline to do so. There is no reason to regard Section 319's differentials in the amounts of money that candidates may receive from private sources as more suspect than analogous differentials in the distribution of federal funds.

While acknowledging that the public financing system upheld in *Buckley* "furthers legitimate government interests," appellant contends that "[n]o equivalent benefits can be found in expanding contribution limits for a candidate who happens to be in a race with a self-financed opponent." J.S. 14. Appellant is correct that the core rationale for Section 319—*i.e.*, the public interest in diminishing the importance of personal wealth as a crite-

rion for election to federal office—was not specifically identified in *Buckley* and is not identical to the interests that public financing of presidential campaigns is intended to serve. Appellant makes no effort, however, to refute Congress's determination that the interests underlying Section 319 are legitimate and weighty ones. Because Section 319 serves important government interests, and because *Buckley* makes clear that Congress may differentiate between candidates who abide by statutory spending thresholds and candidates who choose to exceed them, appellant's equal protection claim lacks merit.

Appellant's contention (J.S. 15) that Section 319 on its face favors incumbents over challengers is unsupported by the record. To the contrary, Congress adopted a "gross receipts advantage" approach (see note 2, *supra*) to reduce any benefit to incumbents and other candidates who may be able to raise sizable amounts in the year prior to the election. The "gross receipts advantage" in the election year is calculated based on funds acquired by each candidate as of December 31 of the year before the general election and counts 50% of gross receipts "that may be expended in connection with the election." 2 U.S.C. 441a-1(a)(2)(B)(ii) (Supp. V 2005). By taking account of the funds raised prior to the election year, Congress sought to ensure that incumbents do not unfairly benefit from "war chests" they have built up in advance. Indeed, during the first four years after Sections 304 and 319 were adopted, 110 House and Senate candidates became eligible to receive enhanced contributions under the modified limits, but only six were incumbents. See FEC's Statement of Material Facts Not in Genuine Dispute paras. 63, 75 (Sept. 8, 2006). If

Section 319 were designed as appellant suggests, it has proved remarkably ineffective.

Finally, appellant's complaints (J.S. 16) about the details of the percentages, dates, and calculations included in Section 319 are not of constitutional dimension. In upholding the FECA provisions that govern public financing of presidential campaigns, the Court in *Buckley* explained that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. Without any doubt a range of formulations would [adequately serve the relevant congressional purposes]. We cannot say that Congress' choice falls without the permissible range." 424 U.S. at 103-104. The same analysis applies here.

4. As the district court correctly held (J.S. App. 6a-7a), appellant has standing to challenge the disclosure requirements imposed by Section 319. Because appellant loaned his campaign more than $350,000, he was subject to those disclosure requirements even though his opponent did not ultimately invoke Section 319's modified contribution and coordinated-expenditure limits. And while Section 319's disclosure obligations do not differ substantially from the pre-existing FECA requirements, the differences are sufficient to constitute an Article III "injury in fact."[8]

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[8] Whether appellant's challenge to Section 319's disclosure provisions remained justiciable after the 2006 election presents a closer question. Appellant has not filed with the Commission a Statement of Candidacy for the 2008 election cycle or otherwise indicated to the Court that he intends to run another self-financed federal campaign. On balance, however, appellant's prior history of participation as a candidate in elections for the House of Representatives presumably provides a sufficient basis for concluding that the current dispute between the

On the merits, however, appellant's constitutional challenge raises no substantial federal question. Appellant contends (J.S. 13) that Section 319's disclosure requirements "single out appellant and reward his opponent simply because [appellant] has chosen to spend his own money on his campaign." That is incorrect. For two reasons, Section 319's disclosure provisions do not impermissibly "single out" self-financing candidates.

a. The disclosure requirements that Section 319 imposes on self-financing candidates do not differ substantially from the obligations that are imposed on *all* candidates for federal elective office. Section 319 requires self-financing candidates to file (i) a declaration of intent to self-finance; (ii) an initial notification that the candidate has spent more than $350,000 of personal funds; and (iii) additional notifications within 24 hours after each $10,000 in aggregate expenditures. 2 U.S.C. 441a-1(b) (Supp. V 2005). Except for the declaration of intent, similar information is ultimately disclosed under preexisting FECA provisions. See, *e.g.*, 2 U.S.C. 432(e)(1), 434(b); 11 C.F.R. 101.1, 104.3; J.S. App. 16a (noting appellant's concession that "all of the information required by [Section 319's] reporting provisions would eventually have to be disclosed to the FEC whether or not [Section 319] ever applies").

As the district court explained, this Court "has consistently upheld against First Amendment challenges statutes that impose the burden of reporting campaign finance fundraising and expenditures no less onerous than those that trouble [appellant]." J.S. App. 14a. The district court noted in particular that, because appel-

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parties over the constitutionality of Section 319's disclosure provisions is likely to recur.

lant's challenge "is essentially a complaint about the timing elements of the reporting requirements," the challenge must fail because "the timing deadlines of [Section 319] are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." *Id.* at 16a. Even the requirement that a self-financing candidate report within 24 hours each additional expenditure of $10,000 in personal funds after spending $350,000 "mirrors the deadline for reporting each $10,000 expenditure on electioneering communications upheld by the *McConnell* Court." *Ibid.*; see *id.* at 15a (explaining that the Court in *McConnell*, 540 U.S. at 194-202, upheld a 24-hour deadline for reporting each $10,000 expenditure on electioneering communications). Because Section 319's disclosure provisions are substantially similar to requirements that have previously been upheld by this Court, they impose no unconstitutional burden on appellant's political expression, and they cannot properly be said to "single out" self-financing candidates.

b. The district court also correctly explained that "any burden that [Section 319's] reporting provisions may hypothetically impose is not 'unilateral'" because "[t]he opponent of a self-financed candidate also faces additional reporting requirements, which are similar to those of the self-financed candidate[]." J.S. App. 16a. Under Section 319, *all* candidates must file a declaration about whether they intend to spend personal funds. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005). The opponent of a self-financed candidate must (i) calculate the OPFA when the threshold is reached and each time the self-financed candidate reports an additional $10,000 expenditure; (ii) file a notice within 24 hours if and when the new OPFA entitles the candidate to solicit increased

contributions; (iii) file a notice with the Commission and the national and state committees of his political party within 24 hours if and when increased contributions received have reached the proportionality cap; and (iv) report any refunds of money raised under Section 319. 11 C.F.R. 400.30(b), 400.31(e)(1)(ii). In addition, political parties that make coordinated expenditures pursuant to Section 319 must report, within 24 hours, those expenditures to the FEC and to the candidate on whose behalf the money was spent. 11 C.F.R. 400.30(c)(2). For those reasons as well, appellant is wrong in arguing that Section 319's disclosure provisions "single out" self-financing candidates.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 2007

JOINT APPENDIX

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No. 07-320

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IN THE

Supreme Court of the United States

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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February 20, 2008

JURISDICTIONAL STATEMENT FILED SEPTEMBER 11, 2007.
JURISDICTION POSTPONED TO THE HEARING OF THE CASE ON THE MERITS.

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The following opinions, decisions, and orders have been omitted in printing this joint appendix because they appear in the appendix to the Petition for a Writ of Certiorari:

Memorandum Opinion of the District Court, August 9, 2007 ..... J.S. App. 1a

Judgment, August 9, 2007 ..... J.S. App. 19a

JURISDICTION POSTPONED

07-320 DAVIS, JACK V. FEDERAL ELECTION COMMISSION

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The brief of appellant is to be filed on or before Wednesday, February 20, 2008. The brief of appellee is to be filed on or before Wednesday, March 19, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
(Washington, DC)

CIVIL DOCKET FOR CASE #: 1:06-cv-01185-HHK

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/28/2006	1	COMPLAINT against FEDERAL ELECTION COMMISSION (Filing fee $ 350) filed by JACK DAVIS. (Attachments: # 1 Declaration)(lc,) (Entered: 06/30/2006)
06/28/2006	2	MOTION For Three-Judge Court by JACK DAVIS. (lc,) Additional attachment(s) added on 7/3/2006 (nmw,). (Entered: 06/30/2006)
06/28/2006	3	MOTION to Expedite by JACK DAVIS. (Attachments: # 1 Text of Proposed Order) (lc,) (Entered: 06/30/2006)

* * * *

DATE	NO.	PROCEEDINGS
07/10/2006	5	Memorandum in opposition to re 3 MOTION to Expedite filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 # 2 # 3)(Baker, Holly) (Entered: 07/10/2006)
07/11/2006	6	Order Granting 2 Plaintiff's Application For Three Judge Court. Signed by Judge Henry H. Kennedy, Jr., on July 11, 2006. (FL,) (Entered: 07/11/2006)
		* * * *
07/21/2006		Order filed in USCA dated 7/14/06, designating Circuit Judge Thomas B. Griffith and District Judge Gladys Kessler to serve with District Judge Henry H. Kennedy to hear and determine this case. (adc) (Entered: 07/21/2006)
		* * * *
07/28/2006	9	ORDER denying 3 Motion to Expedite (Kennedy, Henry) (Entered: 07/28/2006)
08/18/2006	10	MOTION for Summary Judgment by JACK DAVIS. (Attachments: # 1 Statement of Facts # 2 Memorandum of Points and Authorities# 3 Exhibit 1# 4 Exhibit 2# 5 Exhibit 3# 6 Exhibit 4# 7 Exhibit 5# 8 Exhibit 6# 9 Exhibit 7# 10 Exhibit 8# 11 Exhibit 9# 12 Text of Proposed Order)(Herman, Andrew) (Entered: 08/18/2006)

DATE	NO.	PROCEEDINGS
08/28/2006	11	ANSWER to Complaint by FEDERAL ELECTION COMMISSION. Related document: 1 Complaint filed by JACK DAVIS,.(Rajan, Claire) (Entered: 08/28/2006)
09/08/2006	12	MOTION for Summary Judgment and Memorandum in Support of FEC's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, FEC's Statement of Material Facts, and FEC's Statement of Genuine Issues by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Exhibit Exhibits to FEC's Motion for Summary Judgment# 2 Text of Proposed Order)(Rajan, Claire) (Entered: 09/08/2006)
09/08/2006	13	Memorandum in opposition to re 10 MOTION for Summary Judgment and FEC's Statement of Material Facts, and FEC's Statement of Genuine Issues filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Exhibit Exhibits to FEC's Motion for Summary Judgment# 2 Text of Proposed Order) (Rajan, Claire) (Entered: 09/08/2006)

* * * *

DATE	NO.	PROCEEDINGS
10/20/2006		Minute Entry for proceedings held before Judge Henry H. Kennedy, Judge Gladys Kessler, and Judge Thomas B. Griffith. Three-Judge Court hearing held on 10/20/2006. Andrew Herman for plaintiff; Colleen T. Sealander for defendant. Oral argument held; Decision reserved. (Court Reporter Annie Shaw.) (tj) (Entered: 10/20/2006)
08/09/2007	19	Memorandum Opinion. Signed by United States Circuit Judge Thomas B. Griffith, United States District Judge Gladys Kessler and United States District Judge Henry H. Kennedy, Jr., on August 9, 2007. (FL,) (Entered: 08/09/2007)
08/09/2007	20	Judgment in favor of defendant, Federal Election Commission, and against plaintiff, Jack Davis. Signed by United States Circuit Judge Thomas B. Griffith, United States District Judge Gladys Kessler and United States District Judge Henry H. Kennedy, Jr., on August 9, 2007. (FL,) (Entered: 08/09/2007)
08/16/2007	21	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES as to 19 Memorandum & Opinion, 20 Judgment, by JACK DAVIS. Filing fee $ 455, receipt number 4616006250. Fee Status: Fee Paid. Parties have been notified. (tg,) (Entered: 08/17/2007)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NUMBER 1:06CV01185
JUDGE: Henry H. Kennedy
DECK TYPE: 3-Judge Court
DATE STAMP 06/28/2006

JACK DAVIS,
Davis for Congress
P.O. Box 2006
Akron, NY 14001

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
999 E Street, NW
Washington, D.C. 20463,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Jack Davis, a Democratic candidate for New York's 26th District seat in the United States house of Representatives in the 2006 election, brings this action for declaratory and injunctive relief alleging as follows:

INTRODUCTION

1. This is an action challenging certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq*. The challenged provisions of the BCRA/FECA, which together are commonly known as

the Millionaires' Amendment, infringe on Mr. Davis's constitutional rights to fund his campaign primarily with his own money by depriving him of the protections guaranteed by the First and Fifth Amendments to the United States Constitution. Plaintiff seeks a declaration that these provisions are invalid and unenforceable, as well as an injunction barring the Defendant Federal Election Commission ("FEC") from enforcing these unconstitutional provisions against him.

2. In 2002, Congress enacted, *inter alia*, Section 307(a) of the BCRA which greatly increased the amount of money that the law permits individual donors to contribute to candidates in federal campaigns. The provision amended the FECA to raise the limits on individual contributions to candidates from $1,000 to $2,000 per election, and from $2,000 to $4,000 per election cycle. Section 307(d) of the BCRA indexes these contribution caps for inflation and currently sets the limits at $2,100 per election and $4,200 per election cycle.

3. In enacting these limits, however, Congress carved out a significant and patently unconstitutional exception to the prophylactic rules. The Millionaires' Amendment (or "Amendment") provisions of the new law punish individuals who wish to self-finance their campaigns and metes out this punishment in a particularly irrational, even perverse, manner. *See* BCRA § 319, 2 U.S.C. § 441a-1. Instead of limiting the corrupting influence of campaign contributions, the Act serves to protect the well-financed incumbents who wrote the statute and allows them almost unlimited access to money donated by committees and individual donors.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, because it arises under the First and Fifth Amendments to the United States Constitution, as well as under 28 U.S.C. § 2201, because it concerns a declaratory judgment. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and Section 403 of the BCRA which provides that any constitutional challenge to the Amendment shall be filed in the United States District Court for the District of Columbia and shall be heard by a three-judge court convened pursuant to 28 U.S.C. § 2284.

PARTIES

5. On March 30, 2006, Plaintiff Jack Davis declared his candidacy for the Democratic Party's nomination for New York's 26th District seat in the United States House of Representatives. In 2004, Mr. Davis was the Democratic candidate for the same seat and lost to Republican Thomas Reynolds in the general election. The primary election will he held on Tuesday, September 12, 2006. If Mr. Davis wins the Democratic nomination, he will face the Republican nominee in the general election for the seat on November 7, 2006. Mr. Davis intends to spend over $350,000 of his own funds to finance his own campaign. *See* Declaration of Jack Davis, attached hereto as Exhibit 1 and incorporated herein by this reference. Accordingly, Mr. Davis will have to comply with the requirements of the Millionaires' Amendment's notice requirements and his opponent will likely benefit from the Amendment's relaxation of contribution limits. *See generally* 2 U.S.C. § 441a-1.

6. Defendant Federal Election Commission is a commission established by 2 U.S.C. § 437(c) which

enforces the provisions of the BCRA/FECA including Section 319 and generally regulates the campaigns of candidates for federal office. As such, the FEC is charged with administering the campaign finance system in federal elections.

LEGAL AND FACTUAL ALLEGATIONS

Supreme Court Jurisprudence Recognizes that—Contrary to Individual and Committee Contributions—Self-Financing is Not Corruptive of the Electoral Process

7. The Supreme Court has held that, contrary to individual and committee campaign donations, self-financing does not have a corrupting influence on elections. *See Buckley v. Valeo*, 424 U.S. 1, 52 (1976). Yet, the Millionaires' Amendment provisions inject a torrent of campaign contributions into the system by relaxing individual limits and abolishing committee limits.

8. The provisions at issue in this Complaint offend the two pillars of campaign finance law articulated by the Supreme Court. First, that any "restraint on personal expenditures by candidates on their own behalf . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (holding unconstitutional the FECA's limitation on expenditures by candidates from personal resources). Second, that the primary interest served by any generally applicable contribution limits imposed by campaign finance law is the "prevention of actual and apparent corruption of the political process." *Buckley*, 424 U.S. at 52.

9. Indeed, the Supreme Court reaffirmed *Buckley* as recently as Monday of this week. *See Randall v.*

Sorrell, 2006 Lexis 5161, 548 U.S. __, No. 04-1528, slip op. (June 26, 2006). In rejecting exceptionally restrictive contribution limits imposed by the state of Vermont, the Court not only declined to limit *Buckley's* First Amendment holdings, *Randall* at *22-35, 6-8, but also based its decision in part on the f act that the limits would significantly disadvantage challengers' ability to run competitive campaigns against incumbents, *Randall* at *80-97, 19-22.

10. In enacting the Millionaires' Amendment, Congress violated *Buckley's* core holdings. The Amendment neither prevents corruption nor levels the playing field. Instead, it dramatically tilts the field to benefit incumbents and their big-money patrons. The statute and regulations consistently and thoroughly operate to protect incumbents from self-financed candidates by turning Supreme Court jurisprudence on its head; in the upside-down realm of the Millionaires' Amendment, self-financed funds corrupt while virtually limitless individual and committee donations pose no danger to the electoral process and, thus, are promoted.

The Millionaires' Amendment Serves to Punish Self-Financed Candidates and Reward Those Who Rely on Campaign Contributions, Particularly Incumbents.

11. The Amendment works its harm on Plaintiff in two ways, one patent and one that is concealed in the thicket of regulations promulgated by the FEC.

12. On its face, the Amendment is harmful enough to Mr. Davis. The statute generally permits incumbents (and other candidates) facing self-financed candidates who have exceeded a $350,000 threshold to 1) raise three times more money than normal from

individual donors, 2) receive unlimited donations from party committees (where the normal limit is $10,000 per election); and 3) receive contributions from donors who have exceeded their normal limits of $37,500 per election. *See* 2 U.S.C. § 441a-1(a)(1)[1]; *see generally* 11 C.F.R. §§ 400.1-400.54.

13. The harm buried in the calculations that the Amendment applies to determine a candidate's eligibility for the relaxed limits is even more insidious. While the statute and regulations make a feint towards offering measures to insure that candidates with ample funds (either from donations or self-financing do not benefit from the Millionaires' Amendment relaxed limits, these measures are so toothless and readily manipulated as to he wholly meaningless. *See* 11 C.F.R. §§ 400.10.

14. As directed by the Statute, the regulations compel self-financed candidates to predict at the very start of their campaign if they will exceed a threshold of $350,000. When they have exceeded that threshold, they must account to both the FEC and their opponent all of their additional expenditures in real time. *See* 2 U.S.C. §441a-1(b) (mandating 24-hour reporting period): *see also* 11 C.F.R. §§ 400.20-400.25. Their opponents may then rely on these figures to perform a calculation to determine if they qualify for the relaxed contribution limits. *See* 11 C.F.R. § 400.10.

---

[1] BCRA Section 304(a), adding Section 315 of the FECA, 2 U.S.C. § 441a, makes similar changes for Senate races. While Plaintiff's Complaint focuses on the unconstitutional effects of Section 319 on his House of Representatives contest, these claims would apply with equal force to Section 304(a) and its effect on Senate races.

15. Conversely, the candidate relying upon campaign donations need only calculate the amount of their receipts on December 31 of the year preceding the election. *See* 2 U.S.C. § 441a-1(a)(2)(B)(ii): *see also* 2 C.F.R. § 400.10; FEC Form 3Z-1 (Consolidated Report of Gross Receipts for Authorized Committees). Even if the candidate receives millions of dollars in additional funding from individuals or committees after that date for purposes of the Millionaires' Amendment, the December 31 total remains fixed from January 1 through Election Day. *See id.*

16. As such, while the BCRA requires the self-financed candidate to provide both his opponent and the FEC with a "real time" depiction of the amount of funds he has provided, it allows the candidate relying on campaign contributions to take a "snap-shot" on December 31 of the year before the election. For purposes of calculating eligibility for the relaxed contribution limits that candidate may then rely on that snapshot, however inaccurate it may be, for the duration of the campaign, a period of over eight months. Accordingly, a candidate could manipulate his receipts to gain eligibility for the financial bonanza available under the Millionaires' Amendment's relaxed limits without compromising his ability to raise and spend additional campaign funds under the normal method.

17. The Amendment is particularly generous to incumbents, who can often tap into huge campaign war chests accumulated from previous elections and usually run unopposed in their party primaries. By essentially "stashing" money in their primary campaign funds, incumbents can create the illusion of poverty for purposes of the Amendment, qualify for the relaxed limits, and collect vast additional sums of

donations. *See. e.g.*, FEC Form 3Z-1 (providing accounting requirements for Millionaires' Amendment calculations).

18. Because it is so easy to "game" the Millionaires' Amendment's figures, only the most accounting-challenged candidate ever need worry about calculating eligibility under the provision's formulae. Even so, further evidence of the statute's insidiousness is found in the formulae's disparate and illogical treatment of the competing sources of funds for purposes of determining eligibility for the relaxed limits. *See* 11 C.F.R. § 400.10 (providing formulae for computing "Opposition personal funds amount" used to determine eligibility for relaxed contribution limits under the Millionaires' Amendment),

19. One particularly troubling aspect of the complex formulae is that while self-financed funds are computed at actual levels, money received from campaign contributions is discounted by fifty percent. *See id.* § 400.10(a)(3)(i). Congress can offer no explanation for why it elected to count the protected self-financed funds at actual levels while halving the effect of the corrupting contributions.

20. The FEC has provided a "Millionaires' Amendment Hypothetical" to assist a candidate in making these calculations. *See* 68 Fed. Reg. 3970, 3987-3994 (Jan. 27, 2003). In short, a candidate is eligible for the relaxed limits when he has raised (counting fifty cents on the dollar) and personally contributed $350,000 less than his opponent has raised (again, discounted by half) and personally contributed, so long as his opponent has personally contributed more than $350,000 of his own funds. 11 C.F.R. § 400.10.

21. Once this $350.000 threshold has been reached, the regulations allow the candidate to tap into the torrent of money from individual and committee donors. Not only are the individual limits tripled, 2 U.S.C. § 441a-1(a)(A), but the $10,000 limit on State or national committee contributions is abolished. 2 U.S.C. § 441a-1(a)(C). Finally, the individual donors need not count such contributions against their normal personal limits. 2 U.S.C. § 441a-1(a)(B).

22. Once qualified, a candidate can use these relaxed limits to raise up to 100% of the total amount personally contributed by his self-financed opponent. 11 C.F.R. § 400.31(e)(ii); *see also* 441a-1(3)(A)(ii). Again, because of the irregular accounting method mandated by the Amendment, the candidate can simultaneously continue to raise funds normally without compromising his eligibility for the Millionaires' Amendment monetary bonanza.

23. Because Section 319 infringes upon the Plaintiffs' "First Amendment right to engage in the discussion of public issues and 'vigorously and tirelessly . . . advocate his own election," it cannot pass constitutional muster. The provision also infringes upon Plaintiff's Fifth Amendment right to equal protection under the election laws as a candidate for federal office.

COUNT 1
(First Amendment)

24. The First Amendment to the United States Constitution guarantees protection of a person's freedom of association and freedom of speech. Included within these protections is the right to participate freely in political activities including federal elections.

25. In restricting these freedoms through generally-applicable contribution limits, Congress must tread carefully and offer a clear and compelling justification for its actions. In turn, the judiciary must closely scrutinize any such congressional actions. The Supreme Court has accepted, under certain conditions, congressionally-imposed limits on the amount of money that a person may contribute to a candidate or campaign organization because such speech is more symbolic than actual.

26. However, the Court has held that limiting the amount that a candidate may personally spend on her own race imposes a substantial restraint on her ability to engage in protected First Amendment expression. As the Court noted in *Buckley*: "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." 424 U.S. at 52.

27. The Court has rejected all claims that the primary governmental interest served by the BCRA/FECA—namely, "the prevention of actual and apparent corruption of the political process"—justifies limitations on the expenditure of personal funds. *Buckley* at 53.

28. To the contrary, the Court has noted that the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the [FECA's] contribution limits are directed." *Id.*

29. The Supreme Court has also held that "[political] parties capacity to concentrate power to

elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." *FEC v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 481-2 (2001) (holding that a party's coordinated expenditures may be restricted to minimize circumvention of contribution limits).

30. Yet, Congress—apparently unchastened by the Supreme Court's ruling on this issue in *Buckley* and its progeny—has once again sought to limit such constitutionally-protected campaign activity and, paradoxically, foster the exact type of contributions it sought to restrain via the contribution limits set forth in the BCRA.

31. In Section 319 of the BCRA, Congress, by increasing the limits on contributions for the opponents of a self-financed candidate, exempting that contribution from an individual's aggregate limit, and abolishing the limits on coordinated expenditures by the opponent's political party, has violated the Supreme Court's holding in Buckley that any limitation on personal expenditures is unconstitutional.

32. Given that the Supreme Court has rejected the argument that self-financing can ever serve as a source of political corruption for either challengers or incumbents, the only reasonable justification for enactment of Section 319 lies in Congress's desire to equalize the relative financial resources of candidates competing for office.

33. The Court, however, has found this equalizing rationale insufficient to justify any campaign contribution limits that infringe upon fundamental First Amendment rights. *See Buckley*, 424 U.S. at 54.

34. Even this unconstitutional rationale is merely a facade for Congress's actual goal: the protection of incumbents running for re-election. In other words, the members' desire to protect their own seats.

35. Therefore, the increased contribution limits for opponents of self-financing candidates and the waiver of coordinated party expenditures set forth in Section 319 address and satisfy no legitimate purpose under the campaign finance laws. Instead, the provision merely serves to discourage and deter individuals from self-financing and, ultimately, punishes such candidates for expending substantial amounts of their own funds.

36 Accordingly, by increasing the otherwise applicable contribution limits for donor-financed candidates and exempting such donations from individual donor's aggregate Section 319 violates Plaintiff's First Amendment rights to free speech and free association.

37. Moreover, by lifting altogether the limits on coordinated expenditures by the opponent's political party, and thereby allowing that party to spend more money on behalf of the donor-financed candidate. Section 319 violates Plaintiff's First Amendment rights to free speech and association.

38. Finally, by requiring that a candidate makes advance disclosure of his intent to self-finance and provide additional notice of expenditures, Section 319 imposes an unconstitutional condition on the exercise of First Amendment rights of free speech and association.

COUNT II
(Equal Protection)

39. Plaintiff incorporates herein by reference paragraphs 1 through 38 above.

40. The equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution requires that the federal government treat similarly situated persons and entities alike.

41. The Fifth Amendment equal protection principle requires that any restrictions on access to the electoral process survive exacting scrutiny. *Buckley*, 424 U.S. at 94. "A restriction can be sustained only if it furthers a vital governmental interest that is achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Buckley*, 424 U.S. at 95 (citations and quotations omitted).

42. The Supreme Court has also repeatedly rejected Congressional attempts to justify campaign finance limitations that simply seek to "level the playing field" for all candidates. *See Buckley*, 424 U.S. at 48-49 (no asserted interest exists in "equalizing the relative ability of individuals and groups to influence the outcome of elections").

43. In Section 319, Congress has chosen to hamper the opportunities for self-financed candidates, such as Plaintiff, by increasing the limits on contributions for the donor-financed candidate and abolishing the limits on coordinated expenditures by the opponent's political party. In so doing, the provision punishes Plaintiff for seeking to avoid the corrupting influence of campaign donations by largely self-financing his own campaign. Perversely Section 319 actually increases the appearance and actuality of corruption by injecting more money from campaign donations into the electoral process.

44. Finally, Congress has failed to identify any other "vital" governmental interest that is furthered by relaxation of these limits. In fact, during congressional debate one Senator opposed to this provision stated: "[I]t seems to me this is what I would call incumbency protection," 147 Cong. Rec. S2542 (daily ed. March 20, 2001) (statement of Sen. Dodd). Certainly, "incumbency protection" has never been recognized as a vital governmental interest.

PRAYER FOR RELIEF

WHEREFORE, relying on the foregoing allegations, Plaintiff prays for the following relief:

A. an order and declaratory judgment declaring Section 319 of the BCRA, codified in 2 U.S.C. § 441a-1, unconstitutional;

B. a preliminary and permanent order and injunction enjoining Defendant from enforcing Section 319 of the BCRA;

C. costs and attorneys' fees pursuant to any applicable statute or authority; and

D. any other relief as this Court in its discretion deems just and appropriate.

Respectfully Submitted,

/s/ Stanley M. Brand
STANLEY M. BRAND
D.C. Bar # 213082

ANDREW D. HERMAN
D.C. Bar # 462334

HELEN-MARY B. MCGOVERN
D.C. Bar # 474367

BRAND LAW GROUP, PC
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for Mr. Jack Davis

Dated: June 28, 2006

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 06-

JACK DAVIS,
Davis for Congress
P.O. Box 2006
Akron, NY 14001

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,
999 E Street, NW
Washington, D.C. 20463,

Defendant.

DECLARATION OF PLAINTIFF JACK DAVIS

I, JACK DAVIS, hereby declare as follows under penalty of perjury:

1. On March 30, 2006, I declared my candidacy for the Democratic Party's nomination for New York's 26th District seat in the United States House of Representatives in the 2006 general election.

2. In 2004, I ran as the Democratic candidate for the same seat and lost to the incumbent, Republican Thomas Reynolds, in the general election.

3. This year the primary election will he held on Tuesday, September 12, 2006. At this time, I am running unopposed for the Democratic nomination.

4. If I receive the Democratic nomination, I will face the Republican nominee on November 7, 2006, in the general election for the seat.

5. My Republican opponent will likely again be the incumbent, Thomas Reynolds.

6. In financing my campaign, I intend to contribute and spend over $350,000 of my own funds to finance my own campaign. I have elected to finance my campaign primarily with my own funds because I believe that candidates who rely heavily on indi vidual and committee contributions suffer from the appearance, and occasionally the actuality, of corruption.

7. Once I have contributed $350,000 of my own funds to my campaign committee's general election fund, I will have to comply with the "Millionaires' Amendment's" notice requirements. *See* 11 C.F.R. §§ 400.20-25. These regulations compel me to inform the Federal Election Commission and my opponent once I have exceeded the $350,000 threshold and, after that, each time that I contribute an additional $10,000 to my campaign. *See id.*

8. At that point, the provisions will likely permit my opponent to avail himself of the benefits from the Amendment's relaxation of individual contribution limits and abolishment of committee contribution limits. *See* 11 C.F.R. §§ 400.30-32.

9. Because I have elected to finance my campaign primarily with my own funds, I will suffer direct injury from the unconstitutional Millionaires' Amendment statute and regulations. The relaxed individual contribution limits and abolished committee limits will allow my opponent to raise significantly more money from donors than under

normal circumstances. In short, the more money that I contribute to my campaign, the more money my opponent will be able to procure from donors and committees.

10. This will directly affect the manner in which I run my campaign, including potentially discouraging me from spending my own money on my race. As a result, I will be harmed by having to anticipate how my opponent will take advantage of the regulations to raise funds in ways that would normally be barred under the nation's campaign finance laws.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: Akron, New York
June 27, 2006

/s/ Jack Davis
JACK DAVIS

/s/ John R. Davis Jr.
JOHN R. DAVIS JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 06-01185
Three Judge Panel

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

PLAINTIFF JACK DAVIS'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

This issue in this case is whether Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") (codified at 2 U.S.C. § 441a-1), Pub. L. No. 107-155, 116 Stat. 81, 91-92 amending the Federal Election Campaign Act ("FECA") (codified at 2 U.S.C. §§ 431-455), commonly known as the Millionaires' Amendment, infringes on Plaintiff Jack Davis's rights to fund his campaign primarily with his own money by depriving him of the protections guaranteed by the First and Fifth Amendments to the United States Constitution.

I. Plaintiff Jack Davis is Running a Primarily Self-Financed Campaign for New York's 26th District Seat in the United States House of Representatives.

1. On March 30, 2006, Plaintiff Jack Davis declared his candidacy for the Democratic Party's

nomination for New York's 26th District seat in the United States House of Representatives. *See* Exhibit ("Ex.") 1, ¶ 1 (Second Declaration of Plaintiff Jack Davis ("Davis Decl.")).

2. At that time, Mr. Davis also announced his intention to self-finance his candidacy. He has now contributed more than $350,000 of his personal funds to his campaign and has triggered the application of the Millionaires' Amendment's provisions. Ex. 1, ¶¶ 5-6. Accordingly, Mr. Davis must now comply with the Millionaires' Amendment's notice and disclosure requirements and will be harmed by the tripling of the individual contribution limits for his contribution-financed opponent, the removal of the ban on coordination between his opponent and party committee, and the lifting of the aggregate limit on individual contributions. *See generally* 2 U.S.C. § 441a-1.

3. Mr. Davis is the Democratic nominee for the congressional seat. *See* Ex. 1, ¶¶ 1-3.

4. On June 28, 2006, Mr. Davis filed a complaint naming the FEC as a defendant and contending that BCRA section 319 (2 U.S.C. § 441a-1), the so-called Millionaires' Amendment, infringes on his constitutional right to fund his campaign primarily with his own money and deprives him of the protections guaranteed by the First and Fifth Amendments to the United States Constitution. *See* Complaint, ¶ 1. As Plaintiff's complaint states, Mr. Davis seeks a declaration from this court that the Millionaires' Amendment is unconstitutional. *Id.*

II. Plaintiff's Opponent Will Be the Incumbent Thomas Reynolds, a Contribution-Financed Candidate, Who Maintains an Enormous Financial Advantage.

5. Mr. Davis will face the Republican nominee, Thomas Reynolds, in the general election on November 7, 2006. *See* Ex. 1, ¶¶ 3-4.

6. Mr. Reynolds, the Republican nominee, currently is the Representative for New York's 26th District in the United Stated House of Representatives. *Id.*

7. Not only is Mr. Reynolds an incumbent officeholder, he is also the Chairman of the National Republican Congressional Committee ("NRCC"). *Id.*, ¶ 4.

8. The NRCC is a fundraising arm of the Republican Party and each year provides millions of dollars in coordinated expenditures to support Republican candidates for the House of Representatives. See FEC Disclosure Report, *located at* http://query.nictusa.com/cgibin/com_rcvd/C00075820/ (last visited Aug. 17, 2006). To fund its largesse, the NRCC receives millions of dollars worth of contributions from political action committees ("PACs") and individuals for its use in political campaigns. *See id.*

9. As both an incumbent member of Congress and Chairman of the NRCC, Mr. Reynolds has been able to accumulate millions dollars of contributions for use in his congressional campaign. *See, e.g.*, Ex. 2 at 4 (Reynolds for Congress Campaign Committee FEC Quarterly Report, filed July 25, 2006). As of the last quarterly report, Mr. Reynolds had $3,083,559.86 cash on hand. *Id.* At that time, by comparison, Plaintiff had just over $22,000 on hand, and had

loaned about $337,000 to his campaign during this election cycle. Ex. 3 at 3- 4 (Davis for Congress FEC Quarterly Report, filed July 14, 2006).

10. As noted above, Plaintiff has now exceeded the $350,000 threshold for triggering the Millionaires' Amendment. As of August 11, 2006, the date of his most recent 24-hour notice to the FEC, Mr. Davis has expended $739,280 in personal funds on his campaign. *See* Ex. 4 (Davis for Congress 24-Hour Notice of Expenditure from Candidate's Personal Funds, filed Aug. 11, 2006).

III. Mr. Reynolds Nearly Doubled Mr. Davis's Spending in the 2004 Election.

11. Mr. Davis campaigned for the same congressional seat as a self-financed candidate against Mr. Reynolds in 2004. *See* Ex. 1, ¶ 2. Mr. Davis lost to Mr. Reynolds in that race. *Id.*

12. Mr. Davis also elected to finance his own candidacy in the 2004 election and exceeded the Millionaires' Amendment threshold by contributing $1.3 million during that cycle; Mr. Reynolds, however, spent over $2.5 million. *Compare* Ex. 5 at 8 (Reynolds for Congress Campaign Committee FEC Post-Election Detailed Summary, filed Feb. 7, 2005) *with* Ex. 6 at 8 (Jack Davis for Congress Campaign Committee FEC Post-Election Detailed Summary, filed Feb. 15, 2005). Contributors funded all $2.5 million raised by Mr. Reynolds during the 2004 election. *See* Ex. 5 at 5-8. In comparison, in 2004 Mr. Davis self-financed all but about $44,000 of his campaign's expenses. *See* Ex. 6 at 5-8.

IV. Despite his Enormous Financial Advantage over Mr. Davis, Mr. Reynolds has Utilized the Loophole in the Millionaires' Amendment to Ensure that He Will Be Able to Qualify for the Statute's Benefits.

13. The data in Mr. Reynolds's FEC forms demonstrates the Millionaires' Amendment's particularly generous loophole for well-funded incumbents. For purposes of the statute, Mr. Reynolds is able to utilize his huge campaign war chest—accumulated over previous contests—to essentially "hide" money in his primary campaign fund. As his December 31, 2005, FEC Form 3Z-1 indicates, Mr. Reynolds designated over $1.44 million in campaign funds towards his primary race, where he is running unopposed. *See* Ex. 7 at 5 (Reynolds for Congress Campaign Committee FEC Forms 3 and 3Z-1, filed Mar. 30, 2006). In comparison, on the same form Mr. Reynolds designated just $120,875 toward his general race against Plaintiff. *See id.*

14. Instead of using the total, current cash on hand to accurately gauge the relative financial status of the candidates, the Millionaires' Amendment calculations accounts for just the $120,875 general election figure reported on December 31, 2005. *See* 2 U.S.C. § 441a1(a)(2)(B)(ii); *see also* 11 C.F.R. § 400.10(a)(3). Thus, that figure is neither accurate, nor current. Adding insult to injury, the formula also discounts the stale, undercounted amount by fifty percent, further diminishing the total accounting of Mr. Reynolds's actual funds. *See* 2 U.S.C. § 400.10(a)(3)(i) (providing formula). While this $60,400 is set off against whatever funds Mr. Davis personally contributes to his campaign, it is stagnant for the entire election cycle. However, each contribu-

tion Mr. Davis makes to his campaign must be reported within 24-hours and is added to the additional funds that Mr. Reynolds may raise under the Millionaires' Amendments. *See* 11 C.F.R. § 400.31(e)); *see also* 441a-1(3)(A)(ii). In sum, if Mr. Davis ultimately spends $1,000,000 of his own money on his campaign, Mr. Reynolds could raise approximately $936,000 under the Millionaires' Amendment's relaxed limits.

15. As noted, Mr. Reynolds has now amassed over three million dollars in campaign contributions for his race against Mr. Davis. *See* Ex. 2 at 4.

V. The Federal Election Commission Enforces the Millionaires' Amendment.

16. Defendant Federal Election Commission is a commission established by 2 U.S.C. § 437(c), which enforces the provisions of the BCRA/FECA including section 319 and generally regulates the campaigns of candidates for federal office. As such, the FEC is charged with administering the campaign finance system in federal elections.

17. The FEC has provided a "Millionaires' Amendment Hypothetical" to assist a candidate in making the required calculations. *See* Ex. 8 (68 Fed. Reg. 3970, 3987-3994 (Jan. 27, 2003). This hypothetical is revealing, not in its clarification of the statute's requirements, but in illustrating the often baffling structure of the Millionaires' Amendment.

18. The FEC has also published a "Millionaires' Amendment Brochure." *See* Ex. 9 (Millionaires' Amendment Brochure (Mar. 2004 (Updated Feb. 2005))).

Respectfully submitted this __ day of August, 2006,

/s/ Andrew D. Herman
STANLEY M. BRAND
D.C. Bar # 213082
ANDREW D. HERMAN
D.C. Bar # 462334
HELEN-MARY B. MCGOVERN
D.C. Bar # 474367
BRAND LAW GROUP, PC
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700
Attorneys for Plaintiff Jack Davis

EXHIBIT 1

Declaration of Plaintiff Jack Davis

August 18, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No, 06-cv01185 (HHK)

Three Judge Panel

JACK DAVIS

Plaintiff,

v.

FEDERAL ELECTION COMMISSION

Defendant.

SECOND DECLARATION OF PLAINTIFF JACK DAVIS

I, JACK DAVIS, hereby declare as follows under penalty of perjury:

1. On March 30, 2006. I declared my candidacy for the Democratic Party's nomination for New York's 26th District seat in the United States House of Representatives in the 2006 general election.

2. In 2004, I ran as the Democratic candidate for the same seat and lost to the incumbent. Republican Thomas Reynolds, in the general election.

3. I will face the Republican nominee on November 7, 2006, in the general election for the congressional seal.

4. My Republican opponent will be the incumbent, Thomas Reynolds, who did not face a primary challenger. He also serves as the Chairman of the National Republican Congressional Committee ("NRCC").

5. In financing my campaign. I have now contributed more than $350,000 of my own funds. I have elected to finance my campaign primarily with my own funds because I believe that candidates who rely heavily on individual and committee contributions suffer from the appearance, and occasionally the actuality of corruption.

6. Because I have now contributed more than $350,000 of my own funds to my campaign committee's general election fund. I must comply with the Millionaires' Amendment's notice and disclosure requirements. These requirements compelled me to inform the Federal Election Commission that I had exceeded the $350,000 threshold. From now until election day, I will be required to inform the Federal Election Commission and my opponent each time that I personally contribute an additional $10,000 to my campaign. All notifications must be made within 24-hours time of making such a contribution. My August 11. 2006, filing with the FF.0 disclosed that I have now personal contributed $739,280 to my campaign.

7. The Millionaires' Amendment will permit my opponent to avail himself of its many benefits including the relaxation of individual contribution limits and abolishment of committee coordination limits. My opponent will also have the advantage of knowing within 24-hours every time that I make an additional expenditure of my own funds.

8. Because I have elected to finance my campaign primarily with my own funds. I am suffering, direct injury from the unconstitutional Millionaires' Amendment statute and regulations. The relaxed individual contribution limits and abolished committee limits will allow my opponent to raise significantly more money from donors than under normal circumstances. In short, the more money that I contribute to my campaign, the more money my opponent will be able to procure from donors and party committee.

9. This will directly affect the manner in which I run my campaign. Including potentially discouraging me from spending more of my own money on the race. As a result, I will be harmed by having to anticipate how my opponent will take advantage of the regulations to raise funds in ways that would normally be barred under the nations finance campaign laws.

Pursuant to 28 U.S.C. § 1746. I declare under penalty, of perjury that the: foregoing true and correct.

Dated: Akron, New York
August 18, 2006

/s/ Jack Davis
JACK DAVIS

/s/ John R. Davis, Jr.
JOHN R. DAVIS, JR.

EXHIBIT 2

FEC Form 3 for Thomas Reynolds

Filed July 25, 2006

07/25/2006 13:

FEC FORM 3

REPORT OF RECEIPTS AND DISBURSEMENTS

For An Authorized Committee

Office Use Only

1. NAME OF COMMITTEE (in full) — USE FEC MAILING LABEL OR TYPE OR PRINT — Example: If typing, type over the lines

Reynolds For Congress

ADDRESS (number and street) PO Box 15388

Check if different than previously reported. (ACC)

Rochester NY 14615

2. FEC IDENTIFICATION NUMBER ▼ — CITY ▲ — STATE ▲ — ZIP CODE ▲ — STATE ▼ DISTRICT

C00336065

3. IS THIS REPORT NEW (N) OR X AMENDED (A)

NY 28

4. TYPE OF REPORT (Choose One)

(a) Quarterly Reports:

- April 15 Quarterly Report (Q1)
- X July 15 Quarterly Report (Q2)
- October 15 Quarterly Report (Q3)
- January 31 Year-End Report (YE)
- Termination Report (TER)

(b) 12-Day PRE-Election Report for the:

Primary (12P) General (12G) Runoff (12R)

Convention (12C) Special (12S)

Election on ____ in the State of ____

(c) 30-Day POST-Election Report for the:

General (30G) Runoff (30R) Special (30S)

Election on ____ in the State of ____

5. Covering Period 04 01 2006 through 06 30 2006

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer Roger Upton

Signature of Treasurer Electronically Filed by Roger Upton Date 07 25 2006

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 2 U.S.C. 437g.

Office Use Only

FEC FORM 3 (Revised 01/2002)

BEST AVAILABLE COPY

SUMMARY PAGE
of Receipts and Disbursements

FEC Form 3 (Revised 02/2003) Page 2

Write or Type Committee Name

Reynolds For Congress

Report Covering the Period: From: 04 01 2008 To: 06 30 2008

	COLUMN A This Period	COLUMN B Election Cycle-to-Date
6. Net Contributions (other than loans)		
(a) Total Contributions (other than loans) (from Line 11(a))	638241.96	2603310.65
(b) Total Contribution Refunds (from Line 20(d))	13500.00	23225.00
(c) Net Contributions (other than loans) (subtract Line 6(b) from Line 6(a))	624741.96	2580085.65
7. Net Operating Expenditures		
(a) Total Operating Expenditures (from Line 17)	234128.75	713131.94
(b) Total Offsets to Operating Expenditures (from Line 14)	409.60	4980.03
(c) Net Operating Expenditures (subtract Line 7(b) from Line 7(a))	233719.15	708151.91
8. Cash on Hand at Close of Reporting Period (from Line 27)	3063669.86	
9. Debts and Obligations Owed TO the Committee (itemize all on Schedule C and/or Schedule D)	0.00	
10. Debts and Obligations Owed BY the Committee (itemize all on Schedule C and/or Schedule D)	0.00	

For further information contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Toll Free 800-424-9530
Local 202-694-1100

DETAILED SUMMARY PAGE
of Receipts

FEC Form 3 (Revised 02/2003) Page 3

Write or Type Committee Name
Reynolds For Congress

Report Covering the Period From: 04 01 2008 To: 06 30 2008

I. RECEIPTS	COLUMN A Total This Period	COLUMN B Election Cycle-to-Date
11. CONTRIBUTIONS (other than loans) FROM:		
(a) Individuals/Persons Other Than Political Committees		
(i) Itemized (use Schedule A)	326039.96	1523477.73
(ii) Unitemized	27774.00	93125.61
(iii) TOTAL of contributions from individuals	353813.96	1616603.34
(b) Political Party Committees	5006.00	26298.45
(c) Other Political Committees (such as PACS)	279423.00	960408.86
(d) The Candidate	0.00	0.00
(e) TOTAL CONTRIBUTIONS (other than loans) (add Lines 11(a)(iii), (b), (c), and (d))	638241.96	2603310.65
12. TRANSFERS FROM OTHER AUTHORIZED COMMITTEES	0.00	0.00
13. LOANS		
(a) Made or Guaranteed by the Candidate	0.00	0.00
(b) All Other Loans	0.00	0.00
(c) TOTAL LOANS (add Lines 13(a) and (b))	0.00	0.00
14. OFFSETS TO OPERATING EXPENDITURES (Refunds, Rebates, etc.)	409.60	4980.03
15. OTHER RECEIPTS (Dividends, Interest, etc.)	12616.49	43525.77
16. TOTAL RECEIPTS (add Lines 11(e), 12, 13(c), 14, and 15) (Carry Total to Line 24, page 4)	651268.05	2651818.45

DETAILED SUMMARY PAGE
of Disbursements

FEC Form 3 (Revised 02/2002) — Page 4

II. DISBURSEMENTS	COLUMN A Total This Period	COLUMN B Election Cycle-to-Date
17. OPERATING EXPENDITURES	234128.75	713131.94
18. TRANSFERS TO OTHER AUTHORIZED COMMITTEES	0.00	0.00
19. LOAN REPAYMENTS:		
(a) Of Loans Made or Guaranteed by the Candidate	0.00	0.00
(b) Of all Other Loans	0.00	0.00
(c) TOTAL LOAN REPAYMENTS (add Lines 19(a) and (b))	0.00	0.00
20. REFUNDS OF CONTRIBUTIONS TO:		
(a) Individuals/Persons Other Than Political Committees	0.00	3725.00
(b) Political Party Committees	0.00	0.00
(c) Other Political Committees (such as PACs)	13500.00	19500.00
(d) TOTAL CONTRIBUTION REFUNDS (add Lines 20(a), (b), and (c))	13500.00	23225.00
21. OTHER DISBURSEMENTS	0.00	0.00
22. TOTAL DISBURSEMENTS (add Lines 17, 18, 19(c), 20(d), and 21) ▷	247628.75	736356.94

III. CASH SUMMARY

23. CASH ON HAND AT BEGINNING OF REPORTING PERIOD	2679920.56
24. TOTAL RECEIPTS THIS PERIOD (from Line 18, page 3)	651268.05
25. SUBTOTAL (add Line 23 and Line 24)	3331188.61
26. TOTAL DISBURSEMENTS THIS PERIOD (from Line 22)	247628.75
27. CASH ON HAND AT CLOSE OF REPORTING PERIOD (subtract Line 26 from Line 25)	3083559.86

EXHIBIT 3

FEC Form 3 for Jack Davis

Filed July 14, 2006

28940238944

07/14/2006 12:38

FEC FORM 3

REPORT OF RECEIPTS AND DISBURSEMENTS

For An Authorized Committee

Office Use Only

1. NAME OF COMMITTEE (In full) — USE PEC MAILING LABEL OR TYPE OR PRINT ▼ — Example: If typing, type over the lines

Davis For Congress

ADDRESS (number and street) ▼ PO Box 2008

Check if different than previously reported. (ACC)

Akron | NY | 14001

2. FEC IDENTIFICATION NUMBER ▼ C00421909

CITY ▲ | STATE ▲ | ZIP CODE ▲ | STATE ▼ DISTRICT

3. IS THIS REPORT X NEW (N) OR AMENDED (A)

NY | 26

4. TYPE OF REPORT (Choose One)

(a) Quarterly Reports:

April 15 Quarterly Report (Q1)

X July 15 Quarterly Report (Q2)

October 15 Quarterly Report (Q3)

January 31 Year-End Report (YE)

Termination Report (TER)

(b) 12-Day PRE-Election Report for the:

Primary (12P) General (12G) Runoff (12R)

Convention (12C) Special (12S)

Election on ____ in the State of ____

(c) 30-Day POST-Election Report for the:

General (30G) Runoff (30R) Special (30S)

Election on ____ in the State of ____

5. Coverage Period 04 01 2006 through 06 30 2006

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer: Mr. Alan J Davis

Signature of Treasurer: Electronically Filed by Mr Alan J Davis Date 07 14 2006

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 2 U.S.C 437g

Office Use Only

FEC FORM 3 (Revised 03/2003)

26940238945

SUMMARY PAGE
of Receipts and Disbursements

FEC Form 3 (Revised 02/2003) Page 2

Write or Type Committee Name

Davis For Congress

Report Covering the Period: From: 04 01 2008 To: 06 30 2008

	COLUMN A This Period	COLUMN B Election Cycle-to-Date
6. Net Contributions (other than loans)		
(a) Total Contributions (other than loans) (from Line 11(d))	8210.00	8210.00
(b) Total Contribution Refunds (from Line 20(d))	0.00	0.00
(c) Net Contributions (other than loans) (subtract Line 6(b) from Line 6(a))	8210.00	8210.00
7. Net Operating Expenditures		
(a) Total Operating Expenditures (from Line 17)	234170.43	323425.62
(b) Total Offsets to Operating Expenditures (from Line 14)	0.00	0.00
(c) Net Operating Expenditures (subtract Line 7(b) from Line 7(a))	234170.43	323425.62
8. Cash on Hand at Close of Reporting Period (from Line 27)	22064.38	
9. Debts and Obligations Owed TO the Committee (Itemize all on Schedule C and/or Schedule D)	0.00	
10. Debts and Obligations Owed BY the Committee (Itemize all on Schedule C and/or Schedule D)	339280.00	

For further information contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Toll Free 800-424-9530
Local 202-694-1100

DETAILED SUMMARY PAGE
of Receipts

FEC Form 3 (Revised 02/2003)

Write or Type Committee Name
Davis For Congress

Report Covering the Period: From: 04 01 2008 To: 06 30 2008

I. RECEIPTS	COLUMN A Total This Period	COLUMN B Election Cycle-to-Date
11. CONTRIBUTIONS (other than loans) FROM:		
(a) Individuals/Persons Other Than Political Committees		
(i) Itemized (use Schedule A)	2900.00	2900.00
(ii) Unitemized	310.00	310.00
(iii) TOTAL of contributions from individuals ▶	3210.00	3210.00
(b) Political Party Committees	0.00	0.00
(c) Other Political Committees (such as PACs)	5000.00	5000.00
(d) The Candidate	0.00	0.00
(e) TOTAL CONTRIBUTIONS (other than loans) (add Lines 11(a)(iii), (b), (c), and (d))	8210.00	8210.00
12. TRANSFERS FROM OTHER AUTHORIZED COMMITTEES	0.00	0.00
13. LOANS		
(a) Made or Guaranteed by the Candidate	150000.00	337280.00
(b) All Other Loans	0.00	0.00
(c) TOTAL LOANS (add Lines 13(a) and (b))	150000.00	337280.00
14. OFFSETS TO OPERATING EXPENDITURES (Refunds, Rebates, etc.)	0.00	0.00
15. OTHER RECEIPTS (Dividends, Interest, etc.)	0.00	0.00
16. TOTAL RECEIPTS (add Lines 11(e), 12, 13(c), 14 and 15) (Carry Total to Line 24, page 4) ▶	158210.00	345490.00

26940238947

DETAILED SUMMARY PAGE
of Disbursements

FEC Form 3 (Revised 02/2003)

II. DISBURSEMENTS	COLUMN A Total This Period	COLUMN B Election Cycle-to-Date
17. OPERATING EXPENDITURES	234170.43	323425.62
18. TRANSFERS TO OTHER AUTHORIZED COMMITTEES	0.00	0.00
19. LOAN REPAYMENTS:		
(a) Of Loans Made or Guaranteed by the Candidate	0.00	0.00
(b) Of all Other Loans	0.00	0.00
(c) TOTAL LOAN REPAYMENTS (add Lines 19(a) and (b))	0.00	0.00
20. REFUNDS OF CONTRIBUTIONS TO:		
(a) Individuals/Persons Other Than Political Committees	0.00	0.00
(b) Political Party Committees	0.00	0.00
(c) Other Political Committees (such as PACs)	0.00	0.00
(d) TOTAL CONTRIBUTION REFUNDS (add Lines 20(a), (b), and (c))	0.00	0.00
21. OTHER DISBURSEMENTS	0.00	0.00
22. TOTAL DISBURSEMENTS (add Lines 17, 18, 19(c), 20(d) and 21) ▷	234170.43	323425.62

III. CASH SUMMARY	
23. CASH ON HAND AT BEGINNING OF REPORTING PERIOD	98024.81
24. TOTAL RECEIPTS THIS PERIOD (from Line 18, page3)	158210.00
25. SUBTOTAL (add Line 23 and Line 24)	256234.81
26. TOTAL DISBURSEMENTS THIS PERIOD (from Line 22)	234170.43
27. CASH ON HAND AT CLOSE OF REPORTING PERIOD (subtract Line 26 from Line 25)	22064.38

EXHIBIT 5

FEC Post-Election Form 3 for Thomas Reynolds

Filed February 7, 2005

02/07/2005 12:68

FEC FORM 3

REPORT OF RECEIPTS AND DISBURSEMENTS

For An Authorized Committee

Office Use Only

1. NAME OF COMMITTEE (In full) — USE FEC MAILING LABEL OR TYPE OR PRINT ▼ — Example: If typing, type over the lines

Reynolds For Congress

ADDRESS (number and street) PO Box 15345

Check if different than previously reported. (ACC)

Rochester NY 14615

CITY ▲ STATE ▲ ZIP CODE ▲

2. FEC IDENTIFICATION NUMBER ▼ C00036066

3. IS THIS REPORT NEW (N) OR x AMENDED (A)

STATE ▼ DISTRICT NY 28

4. TYPE OF REPORT (Choose One)

(a) Quarterly Reports:

April 15 Quarterly Report (Q1)

July 15 Quarterly Report (Q2)

October 15 Quarterly Report (Q3)

January 31 Year-End Report (YE)

Termination Report (TER)

(b) 12-Day PRE-Election Report for the:

Primary (12P) General (12G) Runoff (12R)

Convention (12C) Special (12S)

Election on ____ in the State of ____

(c) 30-Day POST-Election Report for the:

x General (30G) Runoff (30R) Special (30S)

Election on 11 02 2004 in the State of NY

5. Covering Period 10 14 2004 through 11 22 2004

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer Roger Upton

Signature of Treasurer Electronically Filed by Roger Upton Date 02 07 2005

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 2 U.S.C. 437g.

Office Use Only

FEC FORM 3 (Revised 07/2003)

SUMMARY PAGE
of Receipts and Disbursements

FEC Form 3 (Revised 02/2003) Page 2

Write or Type Committee Name

Reynolds For Congress

Report Covering the Period: From: 10 14 2004 To: 11 22 2004

	COLUMN A This Period	COLUMN B Election Cycle-to-Date
6. Net Contributions (other than loans)		
(a) Total Contributions (other than loans) (from Line 11(a)).....	336078.00	2320891.90
(b) Total Contribution Refunds (from Line 20(d)).....	0.00	2340.00
(c) Net Contributions (other than loans) (subtract Line 6(b) from Line 6(a)).....	336078.00	2318551.90
7. Net Operating Expenditures		
(a) Total Operating Expenditures (from Line 17).....	1104264.34	2280535.40
(b) Total Offsets to Operating Expenditures (from Line 14).....	0.00	2973.92
(c) Net Operating Expenditures (subtract Line 7(b) from Line 7(a)).....	1104264.34	2277661.48
8. Cash on Hand at Close of Reporting Period (from Line 27).....	1162522.69	
9. Debts and Obligations Owed TO the Committee (Itemize all on Schedule C and/or Schedule D).....	0.00	
10. Debts and Obligations Owed BY the Committee (Itemize all on Schedule C and/or Schedule D).....	0.00	

For further information contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Toll Free 800-424-9530
Local 202-694-1100

POST-ELECTION DETAILED SUMMARY PAGE

FEC Form 3 (Revised 02/2003) — Report of Receipts and Disbursements — 3 / 194 — Page 5

- If the candidate participated in the general election, use this form for the 30-day Post-General report.
- If the candidate did NOT participate in the general election, use this form for the Year-end report covering through December 31 of the election cycle (due on January 31).

This form is used in lieu of filling out Line Numbers 6 through 7 on Page 2 (Summary Page) and Pages 3 and 4 (the Detailed Summary Page) for the last report filed by a candidate during the current election cycle.

Write or Type Committee Name

Reynolds For Congress

Report Covering the Period: From: 10 14 2004 To: 11 22 2004

I. RECEIPTS

	COLUMN A Total this Period	COLUMN B Election Cycle Total as of 11 02 2004 (date of general election)	COLUMN C Total for 11 03 2004 (date after general election) through 11 22 2004 (last day of reporting period)
11. CONTRIBUTIONS (other than loans) FROM:			
(a) Individuals/Persons Other than Political Committees			
(i) Itemized (Use Schedule A)	208970.00		
(ii) Unitemized	21722.00		
(iii) Total of contributions from Individuals	230692.00	1493662.29	0.00
(b) Political Party Committees	3685.00	15630.50	0.00
(c) Other Political Committees	103701.00	811579.11	0.00

POST-ELECTION DETAILED SUMMARY PAGE

FEC Form 3 (Revised 12/2003) — Report of Receipts and Disbursements — 4 / 194 — Page 5

	COLUMN A Total this Period	COLUMN B Election Cycle Total as of * (date of general Election) (* See page 5 for date)	COLUMN C Total for * (date after general election) Through * (last day of reporting period) (* See page 5 for dates)
(d) The Candidate	0.00	0.00	0.00
(e) TOTAL CONTRIBUTIONS (other than loans) (add Lines 11(a)(iii), (b), (c) and (d))	338078.00	2320891.90	0.00
12. TRANSFERS FROM OTHER AUTHORIZED COMMITTEES	0.00	0.00	0.00
13. LOANS: (a) Made or Guaranteed by the Candidate	0.00	0.00	0.00
(b). All Other Loans	0.00	0.00	0.00
(c). TOTAL LOANS (add Lines 13(a) and (b))	0.00	0.00	0.00
14. OFFSETS TO OPERATING EXPENDITURES (refunds, rebates, etc.)	0.00	2973.92	0.00
15. OTHER RECEIPTS (Dividends, interest, etc)	552.19	32232.71	0.00
16. TOTAL RECEIPTS (add 11(e), 12, 13(c), 14 and 15)	338630.19	2356098.53	0.00

POST ELECTION DETAILED SUMMARY PAGE

5/194

FEC Form 3 (Revised 02/2003) Report of Receipts and Disbursements Page 7

Name or Type Committee Name

Reynolds For Congress

Report the coverage period From: 10 14 2004 To: 11 22 2004

II. DISBURSEMENTS

COLUMN A Total this period	COLUMN B Election Cycle Total as of * (date of general election) (* See page 5 for date)	COLUMN C Total For * Through * (day after general election / day of reporting period) (* See page 5 for date)
17. OPERATING EXPENDITURES		
1104264.34	2280635.40	5397.66
18. TRANSFER TO OTHER AUTHORIZED COMMITTEES		
0.00	0.00	0.00
19. LOAN PAYMENTS		
(a) Of Loans Made or Guaranteed by the Candidate		
0.00	0.00	0.00
(b) Of All Other Loans		
0.00	0.00	0.00
(c) TOTAL LOAN REPAYMENTS (add Lines 19(a) and 19(b))		
0.00	0.00	0.00
20. REFUNDS OF CONTRIBUTIONS TO		
(a) Individuals/Persons Other Than Political Committees		
0.00	1140.00	0.00
(b) Political Party Committees		
0.00	200.00	0.00

POST ELECTION DETAILED SUMMARY PAGE

FEC Form 3 (Revised 02/2003) — Report of Receipts and Disbursements — 6 / 194 — Page 8

COLUMN A Total this period	COLUMN B Election Cycle Total as of * (date of general election) * See page 5 for date)	COLUMN C Total for * Through * (date after general election) (last day of reporting period) * See page 5 for date)
(c) Other political committees (such as PACs)		
0.00	1000.00	0.00
(d) TOTAL CONTRIBUTION REFUNDS (See Lines 20(a), (b) and (c))		
0.00	2340.00	0.00
21. OTHER DISBURSEMENTS		
155000.00	266000.00	0.00
22. TOTAL DISBURSEMENTS (add lines 17, 18, 19(c), 20(d), and 21)		
1269264.34	2548975.40	5397.66

II. NET CONTRIBUTIONS (OTHER THAN LOANS)

(Note: Substitute in box of Line 60 of Summary Page for this report only; subtract line 20(d) from Line 11(a))

336078.00	2318551.90	0.00

IV. NET OPERATING EXPENDITURES

(Note: Substitute in box of Line 67 of Summary Page for this report only; subtract line 14 from Line 17)

1104264.34	2277661.48	5397.66

V CASH SUMMARY

23. CASH ON HAND AT BEGINNING OF REPORTING PERIOD	2093156.84
24. TOTAL RECEIPTS AT THIS PERIOD (from Line 16)	338630.19
25. SUBTOTAL (add Line 23 and Line 24)	2431787.03
26. TOTAL DISBURSEMENTS AT THIS PERIOD (from Line 22)	1269264.34
27. CASH ON HAND AT CLOSE OF REPORTING PERIOD (Subtract Line 26 from Line 25)	1162522.69

EXHIBIT 6

FEC Post-Election Form 3 for Jack Davis

Filed February 15, 2005

02/15/2005 18:21

FEC FORM 3

REPORT OF RECEIPTS AND DISBURSEMENTS

For An Authorized Committee

Office Use Only

1. NAME OF COMMITTEE (in full) — USE FEC MAILING LABEL OR TYPE OR PRINT ▼ — Example: If typing, type over the lines

JACK DAVIS FOR CONGRESS

ADDRESS (number and street) ▼ POST OFFICE BOX 2004

Check if different than previously reported. (ACC)

CITY ▲ AKRON | STATE ▲ NY | ZIP CODE ▲ 14001

2. FEC IDENTIFICATION NUMBER ▼ C00397794

3. IS THIS REPORT NEW (N) OR x AMENDED (A)

STATE ▼ NY | DISTRICT 28

4. TYPE OF REPORT (Choose One)

(a) Quarterly Reports:

- April 15 Quarterly Report (Q1)
- July 15 Quarterly Report (Q2)
- October 15 Quarterly Report (Q3)
- January 31 Year-End Report (YE)
- Termination Report (TER)

(b) 12-Day PRE-Election Report for the:

Primary (12P) General (12G) Runoff (12R)

Convention (12C) Special (12S)

Election on ____ in the State of ____

(c) 30-Day POST-Election Report for the:

X General (30G) Runoff (30R) Special (30S)

Election on 11 02 2004 in the State of NY

5. Covering Period 10 14 2004 through 11 22 2004

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer ROBERT DAVIS

Signature of Treasurer Electronically Filed by ROBERT DAVIS Date 02 15 2004

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 2 U.S.C 437g.

Office Use Only								FEC FORM 3 (Revised 03/2000)

SUMMARY PAGE
of Receipts and Disbursements

FEC Form 3 (Revised 02/2003) Page 2

Write or Type Committee Name

JACK DAVIS FOR CONGRESS

Report Covering the Period: From: 10 14 2004 To: 11 22 2004

	COLUMN A This Period	COLUMN B Election Cycle-to-Date
6. Net Contributions (other than loans)		
(a) Total Contributions (other than loans) (from Line 11(a))	115655.00	501694.36
(b) Total Contribution Refunds (from Line 20(d))	0.00	0.00
(c) Net Contributions (other than loans) (subtract Line 6(b) from Line 6(a))	115655.00	501694.36
7. Net Operating Expenditures		
(a) Total Operating Expenditures (from Line 17)	343333.16	1301664.16
(b) Total Offsets to Operating Expenditures (from Line 19)	0.00	51465.42
(c) Net Operating Expenditures (subtract Line 7(b) from Line 7(a))	343333.16	1250198.74
8. Cash on Hand at Close of Reporting Period (from Line 27)	14524.62	
9. Debts and Obligations Owed TO the Committee (Itemize all on Schedule C and/or Schedule D)	0.00	
10. Debts and Obligations Owed BY the Committee (Itemize all on Schedule C and/or Schedule D)	600000.00	

For further information contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Toll Free 800-424-9530
Local 202-694-1100

POST-ELECTION DETAILED SUMMARY PAGE

3/56

FEC Form 3 (Revised 02/2003) Report of Receipts and Disbursements Page 5

. If the candidate participated in the general election, use this form for the 30-day Post-General report.

. If the candidate did NOT participate in the general election, use this form for the Year-end report covering through December 31 of the election year (due on January 31).

This form is used in lieu of filing out Line Numbers 8 through 7 on Page 2 (Summary Page) and Pages 3 and 4 (the Detailed Summary Page) for the last report filed by a candidate during the current election cycle.

Write or Type Committee Name

JACK DAVIS FOR CONGRESS

Report Covering the Period: From: 10 16 2004 To: 11 22 2004

I. RECEIPTS

	COLUMN A Total this Period	COLUMN B Election Cycle Total as of 11 02 2004 (date of general election)	COLUMN C Total for 11 03 2004 (date after general election) through 11 22 2004 (last day of reporting period)
11. CONTRIBUTIONS (other than loans) FROM:			
(a) Individuals/Persons Other than Political Committees			
(i) Itemized (use Schedule A)	14350.00		
(ii) Unitemized	1105.00		
(iii) Total of contributions from Individuals	15455.00	44114.38	0.00
(b) Political Party Committees	200.00	200.00	0.00
(c) Other Political Committees	0.00	100.00	0.00

03

POST-ELECTION DETAILED SUMMARY PAGE

FEC Form 3 (Revised 12/2003) — Report of Receipts and Disbursements — 4/55 — Page 6

	COLUMN A Total the Period	COLUMN B Election Cycle Total as of * (date of general Election) (* See page 5 for date)	COLUMN C Total for * (date after general election) Through * (last day of reporting period) (* See page 5 for dates)
(f) The Candidate	100000.00	457280.00	0.00
(g) TOTAL CONTRIBUTIONS (other than loans) (add Lines 11(a)(iii), (b), (c) and (d))	115655.00	501694.38	0.00
12. TRANSFERS FROM OTHER AUTHORIZED COMMITTEES	0.00	0.00	0.00
13. LOANS: (a) Made or Guaranteed by the Candidate	0.00	800000.00	0.00
(b) All Other Loans	0.00	0.00	0.00
(c) TOTAL LOANS (add Lines 13(a) and (b))	0.00	800000.00	0.00
14. OFFSETS TO OPERATING EXPENDITURES (refunds, rebates, etc.)	0.00	51465.42	0.00
15. OTHER RECEIPTS (Dividends, Interest, etc)	0.00	0.00	0.00
16. TOTAL RECEIPTS (add 11(a)(iii), 12, 13(c), 14 and 15)	115655.00	1353159.80	0.00

POST ELECTION DETAILED SUMMARY PAGE

FEC Form 3 (Revised 02/2003) Report of Receipts and Disbursements

Write or Type Committee Name

JACK DAVIS FOR CONGRESS

Report the covering period From: 10 / 12 / 2004 To: 11 / 22 / 2004

II. DISBURSEMENTS

COLUMN A Total this period	COLUMN B Election Cycle Total as of * (date of general election) (* See page 5 for date)	COLUMN C Total for * Through * (date after general election) (day day of reporting period) (* See page 5 for date)
17. OPERATING EXPENDITURES		
343333.16	1301664.16	36971.02
18. TRANSFER TO OTHER AUTHORIZED COMMITTEES		
0.00	0.00	0.00
19. LOAN PAYMENTS		
(a) Of Loans Made or Guaranteed by the Candidate		
0.00	0.00	0.00
(b) Other Loans		
0.00	0.00	0.00
(c) TOTAL LOAN REPAYMENTS (Add Lines 19(a) and 19(b))		
0.00	0.00	0.00
20. REFUNDS OF CONTRIBUTIONS TO:		
(a) Individuals/Persons Other Than Political Committees		
0.00	0.00	0.00
(b) Political Party Committees		
0.00	0.00	0.00

POST ELECTION DETAILED SUMMARY PAGE

FEC Form 3 (Revised 03/2003) Report of Receipts and Disbursements 5/55 Page 2

	COLUMN A Total this period	COLUMN B Election Cycle Total as of* (date of general election) (* See page 5 for date)	COLUMN C Total for* Through* (date after general election) (last day of reporting period) (* See page 5 for date)
(c) Other political committees (such as PACs)	0.00	0.00	0.00
(d) TOTAL CONTRIBUTION REFUNDS (See Lines 20(a), (b) and (c))	0.00	0.00	0.00
21. OTHER DISBURSEMENTS	0.00	0.00	0.00
22. TOTAL DISBURSEMENTS (add lines 17, 18, 19(c), 20(d), and 21)	343333.16	1301664.16	36971.02

III. NET CONTRIBUTIONS (OTHER THAN LOANS)

(Note: Schedule A line of Line 46 of Summary Page for this report only; subtract line 20(d) from Line 11(a))

115655.00	501694.38	0.00

IV. NET OPERATING EXPENDITURES

(Note: Schedule A line of Line 47 of Summary Page for this report only; subtract line 14 from Line 17)

343333.16	1250198.74	36971.02

V. CASH SUMMARY

23. CASH ON HAND AT BEGINNING OF REPORTING PERIOD	242202.78
24. TOTAL RECEIPTS AT THIS PERIOD (from Line 16)	115655.00
25. SUBTOTAL (add Line 23 and Line 24)	357857.78
26. TOTAL DISBURSEMENTS AT THIS PERIOD (from Line 22)	343333.16
27. CASH ON HAND AT CLOSE OF REPORTING PERIOD (Subtract Line 26 from Line 25)	14524.62

EXHIBIT 7

FEC Form 3 for Thomas Reynolds

Filed March 30, 2006

03/30/2006 14:05

FEC FORM 3

REPORT OF RECEIPTS AND DISBURSEMENTS

For An Authorized Committee

Office Use Only

1. NAME OF COMMITTEE (In full) — USE FEC MAILING LABEL OR TYPE OR PRINT ▼ — Example: If typing, type over the lines

Reynolds For Congress

ADDRESS (number and street) ▼ PO Box 15385

Check if different than previously reported. (ACC)

Rochester | NY | 14615

2. FEC IDENTIFICATION NUMBER ▼ C00338056

CITY ▲ STATE ▲ ZIP CODE ▲

3. IS THIS REPORT NEW (N) OR X AMENDED (A)

STATE ▼ DISTRICT NY 28

4. TYPE OF REPORT (Choose One)

(a) Quarterly Reports:

April 15 Quarterly Report (Q1)

July 15 Quarterly Report (Q2)

October 15 Quarterly Report (Q3)

X January 31 Year-End Report (YE)

Termination Report (TER)

(b) 12-Day PRE-Election Report for the: Primary (12P) General (12G) Runoff (12R) Convention (12C) Special (12S)

Election on ____ in the State of ____

(c) 30 Day POST-Election Report for the: General (30G) Runoff (30R) Special (30S)

Election on ____ in the State of ____

5. Coverage Period 10 01 2005 through 12 31 2005

I certify that I have examined this Report and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer: Roger Upton

Signature of Treasurer: Electronically Filed by Roger Upton Date 03 30 2006

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 2 U.S.C 437g.

Office Use Only

FEC FORM 3 (Revised 01/2003)

SUMMARY PAGE
of Receipts and Disbursements

FEC Form 3 (Revised 02/2003) Page 2

Write or Type Committee Name

Reynolds For Congress

Report Covering the Period From: M M 10 D D 01 Y Y Y Y 2005 To: M M 12 D D 31 Y Y Y Y 2005

	COLUMN A This Period	COLUMN B Election Cycle-to-Date
6. Net Contributions (other than loans)		
(a) Total Contributions (other than loans) (from Line 11(a))	387281.53	1536656.52
(b) Total Contribution Refunds (from Line 20(d))	0.00	6025.00
(c) Net Contributions (other than loans) (subtract Line 6(b) from Line 6(a))	387281.53	1529630.52
7. Net Operating Expenditures		
(a) Total Operating Expenditures (from Line 17)	112445.79	371303.41
(b) Total Offsets to Operating Expenditures (from Line 14)	501.50	4542.22
(c) Net Operating Expenditures (subtract Line 7(b) from Line 7(a))	111944.29	366761.19
8. Cash on Hand at Close of Reporting Period (from Line 27)	2351682.65	
9. Debts and Obligations Owed TO the Committee (Itemize all on Schedule C and/or Schedule C)	0.00	
10. Debts and Obligations Owed BY the Committee (Itemize all on Schedule C and/or Schedule D)	0.00	

For further information contact:

Federal Election Commission
999 E Street, NW
Washington, DC 20463

Toll Free 800-424-9530
Local 202-694-1100

DETAILED SUMMARY PAGE
of Receipts

FEC Form 3 (Revised 02/2003) Page 2

Write or Type Committee Name
Reynolds For Congress

Report Covering the Period: From: 10 01 2005 To: 12 31 2005

I. RECEIPTS	COLUMN A Total This Period	COLUMN B Election Cycle-to-Date
11. CONTRIBUTIONS (other than loans) FROM:		
(a) Individuals/Persons Other Than Political Committees		
(i) Itemized (use Schedule A)	215235.00	975037.86
(ii) Unitemized	11219.25	55295.50
(iii) TOTAL of contributions from Individuals ▶	226454.25	930333.36
(b) Political Party Committees	4967.09	16838.30
(c) Other Political Committees (such as PACS)	156860.19	588485.86
(d) The Candidate	0.00	0.00
(e) TOTAL CONTRIBUTIONS (other than loans) (add Lines 11(a)(iii), (b), (c), and (d))	387281.53	1535655.52
12. TRANSFERS FROM OTHER AUTHORIZED COMMITTEES	0.00	0.00
13. LOANS		
(a) Made or Guaranteed by the Candidate	0.00	0.00
(b) All Other Loans	0.00	0.00
(c) TOTAL LOANS (add Lines 13(a) and (b))	0.00	0.00
14. OFFSETS TO OPERATING EXPENDITURES (Refunds, Rebates, etc.)	501.50	4542.22
15. OTHER RECEIPTS (Dividends, Interest, etc.)	8289.74	21092.97
16. TOTAL RECEIPTS (add Lines 11(e), 12, 13(c), 14, and 15) (Carry Total to Line 24, page 4) ▶	396072.77	1561290.71

DETAILED SUMMARY PAGE
of Disbursements

FEC Form 3 (Revised 02/2003) Page 4

II. DISBURSEMENTS	COLUMN A Total This Period	COLUMN B Election Cycle-to-Date
17. OPERATING EXPENDITURES	112445.79	371303.41
18. TRANSFERS TO OTHER AUTHORIZED COMMITTEES	0.00	0.00
19. LOAN REPAYMENTS:		
(a) Of Loans Made or Guaranteed by the Candidate	0.00	0.00
(b) Of all Other Loans	0.00	0.00
(c) TOTAL LOAN REPAYMENTS (add Lines 19(a) and (b))	0.00	0.00
20. REFUNDS OF CONTRIBUTIONS TO:		
(a) Individuals/Persons Other Than Political Committees	0.00	25.00
(b) Political Party Committees	0.00	0.00
(c) Other Political Committees (such as PACs)	0.00	6000.00
(d) TOTAL CONTRIBUTION REFUNDS (add Lines 20(a), (b), and (c))	0.00	6025.00
21. OTHER DISBURSEMENTS	0.00	0.00
22. TOTAL DISBURSEMENTS (add Lines 17, 18, 19(c), 20(d), and 21) ▷	112445.79	377328.41

III. CASH SUMMARY	
23. CASH ON HAND AT BEGINNING OF REPORTING PERIOD	2098256.67
24. TOTAL RECEIPTS THIS PERIOD (from Line 16, page3)	366072.77
25. SUBTOTAL (add Line 23 and Line 24)	2464328.44
26. TOTAL DISBURSEMENTS THIS PERIOD (from Line 22)	112445.79
27. CASH ON HAND AT CLOSE OF REPORTING PERIOD (subtract Line 26 from Line 25)	2351882.65

FEC FORM 3Z-1 (File with Form 3) 5/187

CONSOLIDATED REPORT OF GROSS RECEIPTS FOR AUTHORIZED COMMITTEES (11 CFR 104.19)
(Millionaires' Amendment)

Name of Candidate	Candidate ID Number
Thomas M. Reynolds	H8NY27077
Name of Principal Campaign Committee	**Committee ID Number**
Reynolds For Congress	C C00336065
Committee Address	
PO Box 15368	
City / **State** / **ZIP**	
Rochester / NY / 14615-	

Report Covering Period (check one) ☐ through June 30, or ☒ through December 31 of the year preceding the year of the general election

	Primary	General
1. Gross receipts of authorized committees	1440415.71	120875.00
2. Aggregate amount of contributions from personal funds of the candidate	0.00	0.00
3. Gross receipts minus the candidate's personal contributions	1440415.71	120875.00

EXHIBIT 8

FEC Millionaires' Amendment Brochure

March 2004 (Updated February 2005)

Millionaires' Amendment
Federal Election Commission
Published in March 2004 (Updated February 2005)

Introduction

Under provisions of the Bipartisan Campaign Reform Act (BCRA) known as the "Millionaires' Amendment." candidates running against a self-financed opponent may be eligible to receive contributions from individuals at increased limits and to have increased coordinated party expenditures made on their behalf.

Threshold Amounts

The provisions of the Millionaires' Amendment may, in certain circumstances. increase the contribution limits for House and Senate candidates facing opponents who spend personal funds in excess of certain threshold amounts. The threshold amounts and the triggers for increased limits for House and Senate candidates differ. For House candidates. the threshold amount is $350,000. 11 CFR 400.9(b). I louse candidates whose opponent's personal spending exceeds that threshold may trigger increased limits. For Senate candidates, the threshold amount is the sum of $150,000 plus an amount equal to the voting age population of the State in question multiplied by $0.04.[1] 11 CFR 400.9(a). Senate candidates may qualify for increased limits only after an opposing

[1] Differently formulated: $150,00U + (.04 x (voting age population)) = Senate threshold.

candidate's personal spending exceeds twice the threshold amount.

Opposition Personal Funds Amount

Art opposing, candidate's campaign-related expenditures from personal funds in excess of the triggering threshold do not automatically result in increased contribution limits. The Millionaires' Amendment also takes into account fundraising by the campaigns. Campaigns must use the "opposition personal funds amount" formula to determine whether an opposing candidate has spent sufficient personal funds in comparison to the amounts raised by the campaigns to trigger increased contribution limits.

A candidate with a significant fundraising advantage over a self-financed opponent might not receive an increased contribution limit. In this way, the regulations avoid giving increased contribution limits to candidates whose campaigns have a significant fundraising advantage over their opponents.

Increased Individual Contribution Limits for 2005-2006

Under federal law, individuals typically may contribute no more than $2,100 per election to a House or Senate candidate. However, under the conditions discussed below, an individual may make contributions in excess of $2,100 per election.[2]

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[2] It is important to note that contributions made at the increased limit may not be redesignated for a different election. See the FEC brochure on *Contributions*.

House

When a House candidate's "opposition personal funds amount" exceeds $350,000:

- The contribution limits for the candidate triple ($6,300 per election); and
- The national and State party committees may make unlimited coordinated expenditures on behalf of the candidate, 11 CFR 400.41.

Senate

For Senate candidates, the extent to which a candidate's "opposition personal funds amount" exceeds the threshold determines the amount of the increase in contribution limits. If it exceeds:

- Twice the threshold ($300,000 + ($0.08 x VAP)), then the individual contribution limits for the candidate are tripled ($6,300 per election):
- Four times the threshold ($600,000 + ($0.16 x VAP)), then the individual contribution limits for the candidate are raised six-fold ($12,600 per election);
- Ten times the threshold ($1,500,000 +(S0,40 x YAP)), then the contribution limits for the candidate are raised six-fold ($12,600 per election), and the national and State party committees may make unlimited coordinated expenditures on the candidate's behalf. 11 CFR 400.40.

Avoiding Excessive Contributions and Coordinated Party Expenditures under the Increased Limits

Campaigns that accept contributions and coordinated party expenditures under the increased limits must continually monitor the opposition personal funds amount to ensure their continued eligibility for the increased limits, and that they have not accepted excessive contributions.

When the aggregate amount of contributions at the increased limit and coordinated party expenditures at the increased limit is equal to 100% of the opposition personal funds amount (for House candidates) or 110% of the opposition personal funds amount (for Senate candidates). then:

- Candidates must not accept any more contributions at the increased limit 11 CFR 400.31(d)(1) and 400,31(e)(1): and
- National and State party committees must not make any coordinated expenditures at the increased limit on the candidate's behalf. 11 CFR 400.31(d)(2) and (e)(2).

Reporting and Notification

In order to facilitate continuous monitoring of fundraising, personal spending by candidates and coordinated party expenditures, new reporting and notification requirements have been added to FEC regulations.

Form 2
Declaration of Intent in Statement of Candidacy

At the outset, candidates must estimate on their Statement of Candidacy (FEC Form 2) the amount by which their personal spending on the campaign will

exceed the applicable threshold amount 11 CFR 101.1(a). This must be faxed to each opposing campaign (Senate candidates must fax the form to the FEC in addition to filing the original with the Secretary of the Senate).

Form 3Z-1
Disclosure of Gross Receipts and Aggregate Expenditures from Personal Funds

To facilitate opposition personal funds calculations, by July 15 of the year before the election and January 31 of the year in which the election takes place, each principal campaign committee must file a report disclosing the campaign's aggregate gross receipts for the primary and general elections, and the candidate's aggregate contributions from personal funds for the primary and general elections (FEC Form 3Z-1). 11 CFR 104.19.

Form 10
Notification of Expenditures from Personal Funds

A candidate's principal campaign committee must notify the Commission[3] and each opposing candidate within 24 hours when the candidate makes an expenditure from personal funds that aggregates in excess of the triggering threshold (i.e., $350,000 for House candidates and $300,000 + ($0.08 x VAP) for Senate candidates). 11 CFR 400.21.[4] From that time on, the committee must also notify all of the above-listed entities within 24 hours whenever the candidate makes an additional expenditure from per-

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[3] Senate candidates must also inform the Secretary nfthe Senate. 11 CFR 400.21(a).

[4] House candidates must also notify the national party committee of each opposing candidate. 11 CFR 400.21(b).

sonal funds in excess of $10,000. 11 CFR 400.22. This notification must be made by either faxing a copy of FEC Form 10 or e-mailing a copy of FEC Form 10 or equivalent information to all of the entities mentioned above. 11 CFR 400.24.[5]

Schedule F (Party Committees)

National or State political party committees that make coordinated expenditures on behalf of a candidate whose limits have been raised in accordance with the above provisions must notify the Commission and the candidate on whose behalf the expenditure is made within 24 hours. This is done by faxing or e-mailing a copy of Schedule F to the Commission and to the candidate or authorized candidate committee on whose behalf the expenditure was made, 11 CFR 400.30(c)(2).

Form 11
Calculation of Opposition Personal Funds Amount

Each time a candidate committee receives a Form 10 from an opponent, it must recalculate its opposition personal funds amount (use the worksheet provided with the instructions for FEC Form 11). If the committee's opposition personal funds amount exceeds the threshold for increased coordinated party expenditures (i.e., $350,000 for House candidates and $1,500,000 + ($0.40 x VAP) for Senate candidates), then it must file a calculation of its opposition personal Funds amount with the FEC and with its national and State party committees on FEC Form 11 within 24 hours. 11 CFR 400.30(b)(2).

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[5] Senate candidates must tile the original Form 10 with the Secretary of the Senate. 11 CFR 400.24(a).

Form 12
Notice of Suspension of Increased Limits

Candidates operating under increased limits (or their principal campaign committees) must Fax or e-mail FEC Form 12 to their national and State party committees and the FEC within 24 hours after the aggregate amount of contributions accepted and coordinated party expenditures made under the increased limits reaches:

- 100 percent of the opposition personal funds amount for House candidates; or
- 110 percent of the opposition personal Funds amount for Senate candidates. 11 CFR 400.31(d) and (e).

Withdrawal of Opponent

If a candidate's self-financed opponent withdraws From the election:

- The candidate may no longer accept any contribution under the increased limits; and
- The national and State party committees must not make any coordinated expenditures on the candidate's behalf at the increased limits 11 CFR 400.32(b) and (c).

An opponent is considered to have withdrawn from the election on the earlier of the following dates:

- The date on which the candidate publicly announces that he or she is no longer a candidate and ceases to conduct campaign activities; or
- The date on which the candidate becomes ineligible for nomination or election by operation of law. 11 CFR 400.32(a)(2)(i) and (ii).

Disposal of Excess Contributions Made at Increased Limit

Special rules apply for disposing of any excess contributions[6] made at the increased limit:

- The candidate's committee must refund any excess contributions within 50 days of the election for which they were designated. 11 CFR 400.51;
- Contributions made at the increased limit cannot be redesignated for another election. 11 CFR 400.52;
- The candidate's committee must refund the excess contributions to individuals who made them. 11 CFR 400.53(a);
- Any refund checks not cashed within six months of the date on the check must be disgorged to the U.S. Treasury within nine months of the election. 11 CFR 400.53(b); and
- The committee must disclose the source, amount and manner in which any excess contributions were refunded on their next report failing more than 50 days after the election. 11 CFR 400.54.

[6] Excess contributions are contributions that were made at the increased limit but were not spent in connection with the election to which they relate. 11 CFR 400.50.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed September 8, 2006]

Case No. 1:06CV01 185 (TG)(GK)(HK)

Three-judge Court

Defendants Statement of Material Facts Not in Genuine Dispute

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JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Jack Davis

1. Jack Davis is running for the Democratic nomination for the United States House of Representatives in the 26th Congressional District of New York for 2006. He is unopposed in the Democratic primary and expects to run in the general election against incumbent Thomas Reynolds. Complaint ¶ 5, Davis Decl. ¶ 3, Davis 2d Decl. ¶ 1.

2. Davis is also a candidate in the Independence Party primary in New York's 26th Congressional District, and his opponent in that race is Robert Pusateri. He is permitted to run in the primary for two parties because New York employs a "fusion ballot" system in which a major party candidate may

also be on the ballot for a minor party. FEC Ex. 11 at ¶¶ 6, 7.

3. Jack Davis signed a Statement of Candidacy for the 2006 elections on March 23, 2006 and filed it with the Commission on March 30, 2006. FEC Ex. 1.

4. Davis also filed an amended Statement of Candidacy on April 25, 2006, in which he declared his intent to spend no personal funds on his primary election and $1,000,000 on his general election campaign. FEC Ex. 2.

5. As of August 24, 2006, Jack Davis had reported spending $939,280 in his personal funds in the primary campaign. FEC Ex. 3.

6. Jack Davis was the Democratic candidate for the United States House of Representatives in the 26th Congressional District of New York in the 2004 general election. He lost to the incumbent Thomas Reynolds. Plaintiff's Ex. 5; Davis Decl. ¶ 2.

7. During the 2004 election cycle, Jack Davis loaned or contributed approximately $1.2 million of his own personal funds to his primary and general election campaigns. Plaintiff's Ex. 5.

8. During the 2004 election cycle, Jack Davis did not file any of the notifications required by the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), even though he spent personal funds far in excess of the $350,000 notification threshold and subsequently made expenditures of $10,000 or more in personal funds. FEC Ex. 11 at ¶ 5.

Congress's Purpose In Enacting The Millionaires' Amendment

9. Members of Congress have long been concerned about what they saw as an unfair advantage

for self-financing millionaires resulting from the *Buckley* decision. Senator McConnell stated: "[W]e ought to ensure a level playing field in elections involving wealthy candidates, by eliminating the 'millionaire's loophole' to the post-Watergate contribution limits. If a candidate intends to spend or loan massive funds on his campaign, our bill would allow his opponents to accept larger contributions. It's time to stop Congress from becoming nothing more than an exclusive club for millionaires." 133 Cong. Rec. S11388-02 (daily ed. Aug. 6, 1987).

10. Senator Domenici stated: "Unless we are careful, Mr. President, the congressional marketplace will become a Gucci boutique. I am convinced that any reform package must address this obvious inequity. ... [I]n a democracy we must not allow individuals who control vast wealth to enter the election booth with a big, sometimes unassailable, advantage." 133 Cong. Rec. S2683 (daily ed. Mar. 3, 1987).

11. Senator Dole told the Senate in 1989: "The explosion in campaign costs has also affected the composition of the House and the Senate. In recent years, both have turned into so-called millionaire's clubs. Wealthy candidates who can freely spend large sums of their personal money on their own campaigns have an advantage because they can fend off otherwise qualified candidates who lack[] that kind of personal wealth." 135 Cong. Rec. S179-01, S209 (daily ed. Jan. 25, 1989).

12. Senator Moseley-Braun stated: "Talented, but less wealthy candidates will have it tougher than ever. The trend toward a Congress comprised disproportionately of millionaires does a disservice to representative democracy. Such trends are a very troubling aspect of the loss of confidence in our sys-

tem." 142 Cong. Rec. S6761-05, S6790 (daily ed. June 25, 1996).

13. Senator Feingold stated: "In high school, [some people] would say, because I talked so much I would be a good politician . . . . But the one thing they never said to me was, 'R[uss], if you want to go into politics you have to go out and make $ 10 million first . . . that you must be a millionaire.' That we are, in effect, recreating here in Washington the House of Lords, which we freed ourselves from over 200 years ago . . . [T]his is still a country of one person one vote, not $1 million-1 million votes. And it is still a country where every high school student should at least be able to think or dream about participating in the process without having to become a multimillionaire first." 143 Cong. Rec., S10103-04, S10148-50 (daily ed. Sept. 29, 1997).

14. Senator Moseley-Braun was concerned about "an increase in the number of wealthy candidates contributing outlandish sums to their own campaigns. In 1994, for example, one candidate for the Senate spent a record $29 million, 94 percent of which was his own money. During the 1996 election cycle, candidates for federal office contributed $161 million to their own campaigns. . . . Fifty-four Senate candidates and 91 House candidates put $100,000 or more of their own money into their campaigns, either through contributions or loans. It is true that in 1996 only 19 of those candidates won their elections, but the fact remains that the current system allows such candidates to drive up the costs of campaigns and make it more difficult for average citizens to contend for political office. If we allow this trend to continue, it won't be long before only the wealthiest Americans will be able to fully participate in the political

process." 144 Cong. Rec. S884-02, S894 (daily ed. Feb. 24, 1998).

15. The Millionaires' Amendment was introduced during Senate debates on the Bipartisan Reform Act of 2002 on March 30, 2001. The Senate debate on the Millionaires' Amendment is reported at 147 Cong. Rec. S2433-02, S2434-69 (daily ed. Mar. 19, 2001); 147 Cong. Rec. S2536-02, S2536-38, S2546-47 (daily ed. Mar. 20, 2001); 147 Cong. Rec. S2845-02, S2845-52 (daily ed. Mar. 26, 2001); 147 Cong. Rec. S3084-02, S3084-122, S3124-41 (daily ed. Mar. 29, 2001); 147 Cong. Rec. S3183-01, S3283-98 (daily ed. Mar. 30, 2001); 147 Cong. Rec. S3233-06, S3233-61 (daily ed. Ap. 2, 2001), 148 Cong. Rec. S2096, S2142, S2153 (daily ed. Mar. 20, 2002). A variation fashioned to apply to elections for the House of Representatives was added during the House debates. 148 Cong. Rec. H369-01, H371-76, H386-92, H402-11, H413-16, H429-432 (daily ed. Feb. 13, 2002).

16. Senator Feinstein stated: "Increasingly, I see that only wealthy candidates are going to run in some of these big races unless we do something to level that playing field." 147 Cong. Rec. S2433-02, S2459 (daily ed. Mar. 19, 2001).

17. Senator Sessions stated: "First, it talks about disclosure. Within 15 days after a candidate is required to file a declaration of candidacy under Federal law, he or she must declare whether they intend to spend personal funds in excess of $500,000, $750,000, or even $1 million of their own money. It didn't say they can't do that. They can. They simply have to state an intention. I have to state and have to abide by the rule that I cannot raise more than $1,000. What is wrong with asking them to at least say how much they intend to spend? I think that is

reasonable. What could be unfair about that?" 147 Cong. Rec. S2433-02, S2464 (daily ed. Mar. 19, 2001).

18. Senator Collins stated: "I give [Senator Domenici] great credit for bringing up a real problem in our campaign finance system of very wealthy candidates being able to self-finance their races. That discourages a lot of otherwise very qualified people from even running for office in the first place." 147 Cong. Rec. S2433-02, S2469 (daily ed. Mar. 19, 2001).

19. Senator Sessions stated: "Can there be any doubt why a candidate or recruitment committee for any party, Republican or Democrat, is going to look out for people who can put in that kind of money? It gives them a clear advantage in the candidate recruitment process if they can write that kind of check." 147 Cong. Rec. S2433-02, S2464 (daily ed. Mar. 19, 2001).

20. Senator DeWine, a sponsor of the amendment, explained that it "is not an attempt to undo what the [*Buckley*] Court decided. It is not an attempt to limit personal expenditures, nor in any way to inhibit those expenditures, nor in fact to punish people for making those expenditures. . . [I]t is an attempt to correct the inequities in the system and establish fairness in the process." 147 Cong. Rec. S2536-02, S2538 (daily ed. Mar. 20, 2001).

21. Senator DeWine stated: "[T]his provision . . . addresses the public perception that there is something inherently corrupt about a wealthy candidate who can use a substantial amount of his or her own personal resources to win an election. . . ." 147 Cong. Rec. S2536-02, S2538 (daily ed. Mar. 20, 2001).

22. Senator DeWine stated: "What this amendment is aimed at dealing with is the perception, and

the perception that someone can buy a seat in the Senate with their own money. It begins to level that playing field. It makes it more competitive. It enhances free speech, and it does not diminish in any way what that wealthy candidate can say or do or their ability to get their message out, but enables the person who is not wealthy to also get their message out." 147 Cong. Rec. S2536-02, S2547 (daily ed. Mar. 20, 2001).

23. Senator Domenici stated: "The large number of extremely wealthy candidates who spend large amounts of their own money to finance their campaigns reinforces this perception. Many people believe that candidates are attempting to buy their way into office." 148 Cong. Rec. S2096-02, S2153 (daily ed. Mar. 20, 2002).

24. Senator DeWine stated: "This amendment attempts to bring about equity and fairness and also, quite candidly, to increase the opportunity for all candidates to get their ideas to the public." 147 Cong. Rec. S2536-02, S2537 (daily ed. Mar. 20, 2001).

25. Senator DeWine stated: "The Buckley decision has effectively created a substantial disadvantage for opposing candidates who must raise all campaign funds under the current fundraising limitations . . . . So you have the situation where the candidate who cannot self-finance has to raise money in a maximum of $1,000 increments but has to then go up against another candidate who can put in maybe an unlimited amount of money—millions and millions of dollars . . . [E]veryone in the country is limited to $1,000 they can put into a candidate's campaign—everybody in the country except one person. That one person who has the ability to put money in, in an unlimited fashion, in an unlimited amount, is, of

course, the candidate." 147 Cong. Rec. S2536-02, S2537-38 (daily ed. Mar. 20, 2001).

26. Senator DeWine stated: "[T]his amendment will enhance free speech. . . . [T]he end result will not be that the candidate who is the millionaire will have a smaller megaphone—that millionaire who is putting in his or her own money will have the same megaphone they had before this amendment—but what it means is that the candidate who is facing that multimillionaire will also have the opportunity to have a bigger megaphone, to grow that megaphone, if, in fact, he or she can go out and convince enough people to make individual contributions. . . . [I]t will put more money into the political system . . . [but] the effect of that money will be to enhance the first amendment. . . . It will be to enhance people's ability to communicate and get a message across without in any way hurting someone else's ability—namely, the millionaire—to get their message across." 147 Cong. Rec. S2536-02, S2546 (daily ed. Mar. 20, 200 1).

27. Senator DeWine explained that with the rise of self-funded candidates "it is the voters who have less chance to make informed choices in elections. And that is just not good for our democracy. In essence, this struggle between rich and not so rich candidates really is a struggle for the soul of democracy. I say that because the free flow of ideas and information is the basis—the very foundation—of our political system. The exchange of ideas is a prerequisite for democratic governance." 147 Cong. Rec. S2536-02, S2539 (daily ed. Mar. 20, 2001).

28. Senator Domenici stated: "I am more worried about them putting in their money and the person running against them . . . is a challenger. There is no

way, under current law, that person could raise enough money to become known and do what somebody who spends $40 million can." 147 Cong. Rec. S2536-02, S2543 (daily ed. Mar. 20, 2001).

29. Senator McCain stated: "[A]s we know both parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate." 147 Cong. Rec. S2536-02, S2540 (daily ed. Mar. 20, 2001).

30. Senator DeWine stated: "[W]hat has happened is there has become a great search every election cycle, where both the Republicans and the Democrats go out and they don't look for people with great ideas . . . What they look for and what the great search around the country is for is people who have money—the more money the better. If you can find someone who has that money and is articulate, and they are from a key State or from a State that is getting ready to elect a U.S. Senator, then you have found what you were looking for . . . [T]he sad reality is in campaigns today we are moving down a road where personal wealth is becoming the chief qualification for candidates seeking office. The reality is in the last several election cycles, both parties have looked around the country to try to find wealthy candidates who can self-finance their own campaigns." 147 Cong. Rec. S2536-02, S2537, S2546 (daily ed. Mar. 20, 2001).

31. Senator DeWine stated: "This amendment enhances free speech, and it does it in a very rational way. . . [T]his amendment does not allow soft money. This amendment deals with very regulated, very much disclosed hard money. It basically builds on the current system. Where there is the most accountability in the system today, and where we have

had the fewest problems today is with hard money and with individual donors. That is what this amendment builds on. It simply says that a person who is faced with a millionaire putting his or her own money into the campaign has the opportunity, because of this amendment, to go out and raise money from many people. When they raise that money, in each case it will be disclosed very quickly. It will be open to public scrutiny. It will all be very much above board . . . ." 147 Cong. Rec. S2536-02, S2546 (daily ed. Mar. 20, 2001).

32. Senator DeWine stated: "Proportionality is important because it really helps level the playing field from both directions so the wealthy candidate is not punished or is not inhibited from putting his or her own money into the campaign, which is very important. What this means . . . is that we try to increase free speech; we give that nonwealthy candidate the opportunity to get his or her message out." 147 Cong. Rec. S2536-02, S2538 (daily ed. Mar. 20, 2001).

33. Senator DeWine stated: "We do not punish the wealthy candidate. And we take care of that in this well-crafted amendment by saying we will limit how much that nonwealthy candidate can raise above . . . the limits . . . So the wealthy candidate, again, is not punished, is not inhibited, is not discouraged from putting in his or her own money. . . [T]he proportionality provision is key to ensuring that a wealthy candidate is not punished by the less wealthy candidate's ability to raise funds with lower hard money caps." 147 Cong. Rec. S2536-02, S2538 (daily ed. Mar. 20, 2001).

34. Senator Murray stated: "We need to ensure that average citizens not just millionaires can run for

office. When I ran for the Senate in 1992, the most I'd ever earned was $23,000 a year. I wasn't a millionaire. I wasn't a celebrity, but I was able to . . . win a seat in the Senate because the system was open to anyone. That's getting more difficult today." 147 Cong. Rec. S3233-06, S3236 (daily ed. Apr. 2, 2001).

35. Senator McCain stated: "Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. [The Millionaires' Amendment] does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election." 148 Cong. Rec. S2096-02, S2142 (daily ed. Mar. 20, 2002).

36. Representative Tom Davis stated: "This evens the playing field for candidates who are challenging millionaires or who are challenged by millionaires; the individual who can go to McDonald's, have breakfast with himself, write himself a $3 million check and have the largest fund-raising breakfast in history." 148 Cong. Rec. H369-01, H431 (daily ed. Feb. 13, 2002).

37. Representative Capito stated in regard to increased contributions under the Millionaires' Amendment: "Once parity is achieved, the regular contribution limits go back into effect." 148 Cong. Rec. H369-01, H430 (daily ed. Feb. 13, 2002).

38. Representative Shays stated: "Running for office has become increasingly expensive, forcing

candidates to spend unacceptable amounts of time fundraising, and discouraging qualified challengers from running for office because they cannot afford the price of admission. What should be a competition of ideas has become a battle of wealth." 148 Cong. Rec. H339-02, H351 (daily ed. Feb. 13, 2002).

39. Representative Shays stated: "It is also important to the health of our democracy that qualified people come forward to run in elections and to serve as elected representatives. Having the best candidates is good not only in and of itself . . . but will increase citizen participation in elections." 148 Cong. Rec. H339-02, H353 (daily ed. Feb. 13, 2002).

40. Representative Capito stated: "The only way a pure American democracy can work is if people have faith in the system and if they participate. That includes running for office. It is time to recognize that the realities of today's elections prevent many from participating." 148 Cong. Rec. H369-01, H430 (daily ed. Feb. 13, 2002).

Self-financing in Congressional Elections

41. Self-financing of campaigns is the exception not the norm, but in the last two decades, starting in 1984, there has been more self-financing with each election cycle, with a noticeable upward shift in the 1992 election cycle. FEC Ex. 8 at 2.

42. In the 1984-2004 election cycles, self-financing was a more significant source of funds in the primaries than in the general elections, and in House elections, primary candidates self-financed a larger proportion of funds than did nominees. FEC Ex. 8 at 2-3.

43. Professor Steen's research has found that self-financing candidates who spend $350,000 or more in personal funds often do so late in the campaign. FEC Ex. 8 at 6.

44. Before the Millionaires' Amendment was enacted a candidate's anticipated self-financing deterred experienced politicians from entering House races, thus limiting competition, in open seat contests. FEC Ex. 8 at 12.

45. Opponents are not deterred from running against incumbents by the amount of money in the incumbent's campaign account. FEC Ex. 8 at 12.

46. The deterrent effect of self-financing reduces the number of experienced candidates who run and thereby limits voters' choices. FEC Ex. 8 at 12-14.

47. Political parties have often recruited candidates because of their wealth instead of their merit. FEC Ex. 8 at 13-14.

48. For example, the Democratic Party asked Jack Davis's 2004 would-be primary opponent to withdraw from the race because the Party wanted a millionaire to run against the incumbent in the general election. FEC Ex. 8 at 14.

49. Senator Bob Torricelli, chairman of the Democratic Senatorial Campaign Committee, told the media that in recruiting candidates for 2000, the Party needed to have several candidates who did not need any monetary help from the national party. FEC Ex. 8 at 13-14.

50. Professor Steen's research found that in 2004, increased fundraising under the Millionaires' Amendment constituted only 11 percent of the total receipts for these candidates eligible to seek increased contri-

bution amounts. The opponents of Blair Hull in the Democratic primary for Senate in Illinois accounted for more than half of all of these Millionaires' Amendment receipts. Yet none of them came remotely close to equaling Hull's personal expenditures of $28 million. FEC Ex. 8 at 10.

51. Professor Steen's research found that in 2004, Millionaires' Amendment spending did not substantially shift the balance among candidates. FEC Ex. 8 at 11.

52. Professor Steen's research found that in 2004, of all of the opponents of self-financing candidates who triggered the Millionaires' Amendment, only 13 raised more than 10% of their total campaign funds from increased contribution limits. FEC Ex. 8 at 11.

53. In 2004, no political party organization chose to spend more than the normal limit for coordinated party expenditures, even where permitted to do so under the Millionaires' Amendment. FEC Ex. 8 at 11.

54. There is no empirical evidence that self-financing candidates running after the Millionaires' Amendment was enacted are wealthier than self-financing candidates who ran before it was enacted. FEC Ex. 8 at 7-9.

55. Reports filed by candidates with the Commission indicate that as of September 1, 2006, in 2006 House races, 103 candidates have each self-financed at least $50,000, but not enough to trigger the Millionaires' Amendment. The average amount these candidates contributed in personal funds to their campaigns is $228,525. In total, these candidates have spent $23.5 million in personal funds. FEC Ex. 10, Attachment 1.

56. Reports filed by candidates with the Commission indicate that in House races in 2004, 76 candidates each self-financed at least $50,000, but remained short of the $350,000 trigger for the Millionaires' Amendment. The average amount these candidates contributed in personal funds to their campaigns was $185,595.72. In total, these candidates spent $14 million in personal funds. FEC Ex. 10, Attachment 1.

57. Reports filed by candidates with the Commission indicate that in the 2004 election cycle, 19 out of 1,034 House candidates triggered the Millionaires' Amendment spending an average of $1,000,000 per campaign. FEC Exs. 9, Attachment 1, and 10.

58. Reports filed by candidates with the Commission indicate that as of September 1, 2006, in the 2006 election cycle, 15 out of 1,121 House candidates, have triggered the Millionaires' Amendment, spending an average of $1,000,000 per campaign. FEC Exs. 9, Attachment 1, and 10.

59. Reports filed by candidates with the Commission indicate that during the 2004 general election cycle, Charles Taylor, an incumbent in North Carolina's 11th District, triggered the Millionaires' Amendment, spending $822,000 in personal funds. Taylor did not file any notifications regarding his personal funds expenditures. FEC Ex. 9, Attachment 1.

60. Reports filed by candidates with the Commission indicate that Senator Herb Kohl, an incumbent in Wisconsin, triggered the Millionaires' Amendment, spending $5.1 million in his 2006 primary campaign. Senator Kohl did not face any opponents in the primary who met the definition of "candidate" under FECA, 2 U.S.C. 431(2). FEC Ex. 9, Attachment 1.

61. Reports filed by candidates with the Commission indicate that out of the 60 candidates who triggered the Millionaires' Amendment for House and Senate campaigns in 2004 and 2006, more than half ran in elections in which no incumbent was on the ballot. FEC Ex. 9, Attachment 1.

62. Reports filed by candidates with the Commission indicate that in 2004 and 2006, eleven House and Senate incumbents were challenged by self-financed candidates who triggered the Millionaires' Amendment. FEC Ex. 9, Attachment 2.

63. Reports filed by candidates with the Commission indicate that in 2004 and 2006, out of the eleven House and Senate incumbents who were challenged by self-financed candidates who spent enough to trigger the Millionaires' Amendment, only six qualified to accept increased contributions. FEC Ex. 9, Attachment 2.

64. Reports filed by candidates with the Commission indicate that four incumbents did not qualify because they also spent enough personal funds or reported a high gross receipts advantage as of December 3 1 st of the year preceding the election year such that the Millionaires' Amendment did not entitle these candidates to accept increased contributions. FEC Ex. 9, Attachment 2.

65. Reports filed by candidates with the Commission indicate that only two of the six incumbents who were entitled to increased contributions in 2004 and 2006 actually received any. FEC Ex. 9, Attachment 2.

66. Reports filed by candidates with the Commission indicate that in 2004, four House incumbents were challenged by self-financed candidates who

triggered the Millionaires' Amendment. FEC Ex. 9, Attachment 2.

67. A search of reports filed by candidates with the Commission indicates that one House incumbent, Thomas Reynolds, could not raise increased contributions in 2004 because his opponent, Jack Davis, did not file the required notices of his personal spending. FEC Ex. 9, Attachments 1 and 2.

68. Reports filed by candidates with the Commission indicate that out of the four 2004 House incumbents who were challenged by self-financed candidates, only three were entitled to raise increased contributions and only one actually did raise increased contributions. FEC Ex. 9, Attachment 2.

69. Reports filed by candidates with the Commission indicate that Steve LaTourette, the incumbent in Ohio's 14th District in 2004 was the only 2004 House incumbent who actually received increased contributions. LaTourette received $174,8 10 although he was entitled to accept up to $1,123,541 in increased contributions. Therefore, LaTourette only accepted 15.56% of what he was entitled to in increased contributions under the Millionaires' Amendment formula. FEC Ex. 9, Attachment 2.

70. Reports filed by candidates with the Commission indicate that in 2006, two House incumbents were challenged by self-financed candidates who triggered the Millionaires' Amendment. FEC Ex. 9, Attachment 2.

71. A search of reports filed by candidates with the Commission indicates that one House incumbent, Chris Cannon, could not raise increased contributions in 2006 because his opponent, John Jacob, did not file

the required notices of his personal spending. FEC Ex. 9, Attachments 1 and 2.

72. Reports filed by candidates with the Commission indicate that one House incumbent, Pat Tiberi, does not appear to have raised any increased contributions according to the candidate's reporting as of September 1, 2006. FEC Ex. 9, Attachment 2.

73. Reports filed by candidates with the Commission indicate that E. Benjamin Nelson, an incumbent Senator, is the only incumbent who received increased contributions under the Millionaires' Amendment in 2006. Nelson received $24,5 10 although he was entitled to accept up to $2,278,877 in increased contributions under the Millionaires' Amendment formula. Therefore, Nelson received 1.08% of what he was entitled to raise in increased contributions under the Millionaires' Amendment formula. FEC Ex. 9, Attachment 2.

74. Data is not yet available to determine whether Senator Robert Byrd, an incumbent who is facing a self-financed opponent in 2006, has received increased contributions under the Millionaires' Amendment because the opposing self-financed candidate did not exceed the threshold until late August 2006. Senator Robert Byrd has not yet reported an OPFA calculation. FEC Ex. 9, Attachments 1 and 2.

75. Reports filed by candidates with the Commission indicate that the 60 self-financed candidates who triggered the Millionaires' Amendment in 2004 and 2006 faced a total of 131 opponents, 110 of which were eligible to accept increased contributions under the Millionaires' Amendment formulae. FEC Ex. 9, Attachments 1 and 2.

76. Reports filed by candidates with the Commission indicate that of those 1 10 candidates who were eligible to accept increased contributions, only 58 actually did. Those 58 opponents accepted increased contributions under the Millionaires' Amendment averaging 1.2% of what they were entitled to raise under the Millionaires' Amendment formulae. Only five of the 58 raised more than 20% of what they were entitled to under the Millionaires' Amendment, while 60 percent of them raised increased contributions raised less than 5% of what they could have raised. FEC Ex. 9, Attachment 2.

77. Reports filed by candidates with the Commission indicate that in no election that implicated the Millionaires' Amendment in 2004 and 2006 did the amount an opponent was entitled to accept in increased contributions under the Millionaires' Amendment formulae exceed the amount the self-financed candidate spent in personal funds. FEC Ex. 9, Attachment 2.

78. Reports filed by candidates with the Commission indicate that in total, self-financed candidates who triggered the Millionaires' Amendment spent more than $144 million of their personal funds in 2004 and 2006. Their opponents collectively raised a total of only $8.6 million in increased contributions under the Millionaires' Amendment. FEC Ex. 9, Attachments 1 and 2.

79. Reports filed by candidates with the Commission indicate that nine opponents of self-financed candidates also spent more than the applicable threshold in personal funds expenditures, and thus triggered the Millionaires' Amendment on their own. FEC Ex. 9, Attachment 3.

80. Reports filed by candidates with the Commission indicate that out of the nine opponents to self-financed candidates who also exceeded the threshold in personal funds, seven were entitled to accept increased contributions and six did accept increased contributions. Two were not entitled to accept increased contributions under the Millionaires' Amendment formulae. FEC Ex. 9, Attachment 3.

81. Reports filed by candidates with the Commission indicate that in a primary election for North Carolina's 10th District in 2004, Sandy Lyons spent $445,000 in personal funds, but was outspent by another candidate, J. Edgar Broyhill, who spent $1,435,000. Even though Lyons triggered the Millionaires' Amendment in his own personal funds expenditures, he also was entitled to increased contributions as Broyhill's opponent. Lyons was entitled to raise $450,000 in increased contributions, but only received $59,500. FEC Ex. 9, Attachment 3.

82. Reports filed by candidates with the Commission indicate that in a primary election for Georgia's 6th District in 2004, Thomas Price spent $499,000 in personal funds, but was outspent by another candidate, Robert Bruce Lamutt, who spent $1,615,000. Even though Price triggered the Millionaires' Amendment in his own personal funds expenditures, he was also entitled to accept increased contributions as Lamutt's opponent. Price was entitled to raise $755,043 in increased contributions, but only accepted $354,900. FEC Ex. 9, Attachment 3.

83. Reports filed by candidates with the Commission indicate that in a primary election for Georgia's 6th District in 2004, Charles Commander Clay spent $625,000 in personal funds, but was outspent by another candidate, Robert Bruce Lamutt, who spent

$1,615,000. Even though Clay triggered the Millionaires' Amendment in his own personal funds expenditures, he was also entitled to increased contributions as Lamutt's opponent, but did not receive any. FEC Ex. 9, Attachment 3.

84. Reports filed by candidates with the Commission indicate that in a primary election for Texas's 10th Congressional District in 2004, Michael McCaul spent $1,752,000 in personal funds, but was outspent by another candidate, Ben Streusand, who spent $3,389,000. Even though McCaul triggered the Millionaires' Amendment in his own personal funds expenditures, he was also entitled to accept increased contributions as Streusand's opponent. McCaul was entitled to raise $1,637,000 in increased contributions, but only received $108,850. FEC Ex. 9, Attachment 3.

85. Reports filed by candidates with the Commission indicate that in a primary election for Texas's 10th Congressional District in 2004, Dave Phillips spent $422,361 in personal funds, but was outspent by another candidate, Ben Streusand, who spent $3,389,000. Even though Phillips triggered the Millionaires' Amendment in his own personal funds expenditures, he was also entitled to accept increased contributions as Streusand's opponent. Phillips was entitled to raise $1,916,638 in increased contributions, but only received $14,000. FEC Ex. 9, Attachment 3.

86. Reports filed by candidates with the Commission indicate that in a 2004 primary election for an Illinois seat in the United States Senate Andrew McKenna spent $2,407,659 in personal funds and James Oberweis spent $3,004,178, however, both candidates were outspent by Jack Ryan, who spent

$3,500,000. Neither McKenna or Oberweis were entitled to accept increased contributions under the Millionaires' Amendment formulae. FEC Ex. 9, Attachment 3.

87. Reports filed by candidates with the Commission indicate that in a 2004 primary election for a Wisconsin seat in the United States Senate, Tim Michels spent $1,553,000 in personal funds, but was outspent by another candidate, Russ Darrow, who spent $2,711,319. Even though Michels triggered the Millionaires' Amendment in his own personal funds expenditures, he was also entitled to accept increased contributions as Darrow's opponent. Michels was entitled to raise $1,641,319 in increased contributions, but only received $58,500. FEC Ex. 9, Attachment 3.

88. Reports filed by candidates with the Commission indicate that in a 2006 primary election for Illinois's 8th Congressional District, Kathleen Salvi spent $1,237,200 in personal funds, but was outspent by another candidate, David McSweeney, who spent $1,949,249. Even though Salvi triggered the Millionaires' Amendment in her own personal funds expenditures, she was also entitled to accept increased contributions as McSweeney's opponent. Salvi was entitled to raise $712,049 in increased contributions, but only received $105,330. FEC Ex. 9, Attachment 3.

89. Reports filed by candidates with the Commission indicate that out of the 63 campaigns in 2004 and 2006 in which self-financed candidates triggered the Millionaires' Amendment, 15 self-financed candidates won the election. FEC Ex. 9, Attachment 1.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

_____/s/_____
Colleen T. Sealander
Assistant General Counsel

_____/s/_____
Holly J. Baker
Attorney

_____/s/_____
Claire N. Rajan
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
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September 8, 2006

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[Filed September 8, 2006]

Case No. 1:06CV01185 (TG)(GK)(HK)

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Defendant's Statement of Genuine Issues

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF GENUINE ISSUES

Defendant Federal Election Commission ("FEC" or "Commission") hereby responds to plaintiff Jack Davis's Statement of Material Facts as to Which There Is No Genuine Dispute. The Commission's responses and objections are presented below in numbered paragraphs tracking the numbering scheme in Plaintiff's Statement. As a general matter, the Commission objects to the introductory paragraph and headings of Plaintiff's Statement because they are not facts, but argument, and hence, do not belong in a statement of facts.

1. The Commission has no response, except that Jack Davis's Statement of Candidacy, dated March 23, 2006, was filed with the Commission on March

30, 2006. FEC Ex. 1. Mr. Davis filed an amended Statement of Candidacy on April 25, 2006. FEC Ex. 2.

2. The Commission has no response to the first sentence. The Commission notes that Mr. Davis's August 24, 2006 disclosure report on file with the Commission indicates that Mr. Davis had spent more than $350,000 only in the primary election. FEC Ex. 3. The Commission admits that Mr. Davis has spent sufficient personal funds to trigger the Millionaires' Amendment for the primary election for the Democratic nomination, but notes that since he is unopposed in that election he has no opponent who could qualify to raise increased contributions under the provision. FEC Ex. 11 at ¶¶ 6, 7. The Commission also admits that Mr. Davis has spent sufficient funds to trigger the Millionaires' Amendment for the primary election for the Independence Party nomination, but that his sole opponent in that race, Robert Pusitari, has not registered as a candidate with the Commission. FEC Ex. 11 at ¶ 7. The Commission objects to the legal arguments and characterizations in this paragraph because they are not supported by any evidence.

3. The Commission objects because the Democratic primary election has not yet been held, although it is scheduled for September 12, 2006.

4. No response.

5. The Commission admits that the general election is scheduled for November 7, 2006, but objects to ¶ 5 because neither the Democratic nor the Republican primary elections have been held, and thus, neither Mr. Davis nor Rep. Reynolds is yet their party's nominee.

6. The Commission admits that Thomas Reynolds is the current incumbent, but objects to ¶ 6 because the Republican primary election has not yet been held, and therefore, Rep. Reynolds is not yet the Republican nominee.

7. The Commission has no response to the two assertions in ¶ 7, but the Commission objects that Rep. Reynolds's chairmanship of the National Republican Congressional Committee is irrelevant to this facial challenge to the constitutionality of the Millionaires' Amendment.

8. The Commission has no response.

9. The Commission objects to the first sentence because its assertions are unsupported by any evidence; there is no evidence to support the assertion that contributions to Rep. Reynolds were made because he is "both an incumbent and Chairman of the NRCC." The Commission admits that Rep. Reynolds's July 2006 Quarterly Report reports cash-on-hand of more than $3 million. The Commission has no further response to the second and third sentences. Of the $1,535,655.86 in total contributions that Rep. Reynolds reported raising in 2005, $1,440,425.71 is listed as having been contributed for the 2006 primary and $120,875 is listed as having been contributed for the 2006 general on Form 3Z-1.

10. No response, except the Commission notes that Mr. Davis has reported exceeding the $350,000 threshold only for the primary election, and that all of the money he has expended from personal funds to date has been spent in the primary election.

11. No response.

12. No response, except to note that Mr. Davis failed to file any of the notifications (FEC Form 10)

required by the Millionaires' Amendment to disclose when he had spent sufficient personal funds to put the Amendment's provisions into effect. FEC Ex. 11 at ¶ 5.

13. The Commission objects to the first and second sentences of ¶ 13 because they contain legal argument and legal conclusion rather than facts, as well as plaintiff's characterization of the Millionaires' Amendment and Rep. Reynolds's financial disclosure forms, each of which speaks for itself. The Commission objects to the characterization of those forms contained in sentences three and four that Rep. Reynolds "designated" sums of money for his primary campaign and general campaigns, because it is contributors, not candidates, who designate the election to which their contributions are to be applied. 11 C.F.R. 110.1(b).

14. The Commission objects to ¶ 14 because it contains Plaintiff's legal conclusions and characterizations of provisions of the Federal Election Campaign Act and the Commission's regulations, which speak for themselves.

15. The Commission objects that the campaign finance disclosure report filed on July 25, 2006 by Rep. Reynolds's principal campaign committee does not support plaintiff's claim that Rep. Reynolds has "amassed over three million dollars in campaign contributions for his race against Mr. Davis." As noted above in the Commission response to ¶ 9, more than $1.4 million of the nearly $3 million is listed as having been contributed for the primary election, and according to Rep. Reynolds's most recent disclosure report, he has already spent nearly $1.3 million of that amount during the primary election campaign.

16. This paragraph contains plaintiff's characterization of the Federal Election Campaign Act, which speaks for itself.

17. The Commission has no response to the first sentence of ¶ 17. The Commission objects to the second sentence because it contains legal argument and plaintiff's characterization of the Millionaires' Amendment and the Commission's Federal Register Notice, which speak for themselves.

18. No response.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

_____/s/_____
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_____/s/_____
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September 8, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed September 8, 2006]

Case No. 1:06CV01185 (TG)(GK)(HK)
Three-Judge Court
EXHIBIT 2

JACK DAVIS,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBITS SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[Logo]

Saving American jobs, farms and industries

Davis for Congress
P.O. Box 2006 – Akron, NY 14001
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www.jackdavisforcongress.us

Barry J. Conway
FEC Chief, Authorized Branch
Reports Analysis Division
999 E. St. NW
Washington, DC 20463

Re: April 13, 2006 FEC letter
Candidate ID Number: H4NY26045

April 20, 2006

Dear Mr. Conway:

This is in response to your April 13, 2006 letter concerning our Statement of Candidacy form. Please see the enclosed amended FEC Statement of Candidacy Form for Davis for Congress. Please contact me if there are any additional questions or concerns.

Sincerely,

/s/ Jack Davis
JACK DAVIS

Paid for by Davis for Congress

FEC FORM 2
STATEMENT OF CANDIDACY

1. (a) Name of Candidate (in full)
JOHN R. DAVIS, JR.

(b) Address (number and street)
9290 HUNT CLUB LANE

(c) City, State, and ZIP Code
CLARENCE, NY 14031

2. Identification Number
SS# 074-24-9368

3. Is This Statement ☐New (N) or ☒ Amended (A)
A-20-06

4. Party Affiliation
DEMOCRAT

5. Office Sought
HOUSE OF REPRESENTATIVES

6. State & District of Candidate
NY26

DESIGNATION OF PRINCIPAL
CAMPAIGN COMMITTEE

7. I hereby designate the following named political committee as my Principal Campaign Committee for the 2006 election(s).

NOTE: This designation should be filed with the appropriate office listed in the instructions.

(a) Name of Committee (in full)
DAVIS FOR CONGRESS

(b) Address (number and street)
PO BOX 2006

(c) City, State, and ZIP Code
AKRON, NY 14001

DESIGNATION OF OTHER AUTHORIZED COMMITTEES

(Including Joint Fundraising Representatives)

8. I hereby authorize the following named committee, which is NOT my principal campaign committee, to receive and expend funds on behalf of my candidacy.

NOTE: This designation should be filed with the principal campaign committee.

(a) Name of Committee (in full)
NONE

(b) Address (number and street)

_____

(c) City, State, and ZIP Code

_____

DECLARATION OF INTENT TO EXPEND PERSONAL FUNDS (House or Senate Only)

(Including Joint Fundraising Representatives)

9. I intend to expend personal funds exceeding the threshold amount (see 11 C.F.R. 400.9) by

If you do not intend to expend personal funds exceeding the threshold amount for either election, you must enter "0.00" for each.

I certify that I have examined this Statement and to the best of my knowledge and belief it is true, correct and complete.

/s/ John R. Davis, Jr. Date: 4-20-06

Federal Election Commission

ENVELOPE REPLACEMENT PAGE
FOR INCOMING DOCUMENTS

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[Illegible]
PREPARER

4-25-06
DATE PREPARED

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[Filed September 8, 2006]

Case No. 1:06CV01185 (TG)(GK)(HK)

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Three-Judge Court

EXHIBIT 3

DEFENDANT FEDERAL ELECTION COMMISSION'S EXHIBITS SUBMITTED IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

08/24/2006 14:63

FEC FORM 10

24-HOUR NOTICE OF EXPENDITURE FROM CANDIDATE'S PERSONAL FUNDS (11 CFR 400.21 AND 400.22)

(Millionaires' Amendment)

1. Name of Candidate	2. Office Sought	3. State	4. District	5. Candidate ID Number
John R Davis Jr	H	NY	26	H4NY26045

6. Name of Principal Campaign Committee	7. Committee ID Number
DAVIS FOR CONGRESS	C C00421609

8. Address
PO BOX 2008

9. City, State and ZIP Code
AKRON NY 14001

10. Expenditures of Personal Funds

Aggregate Expenditures Previously Reported During the Election Cycle 730280.00

	DATE	ELECTION	AMOUNT	CHECK IF LOAN/DEBT
A.	08 24 2006	X Primary 2006 General Other	200000.00	X Transaction ID : P10000001
B.		Primary General Other		Transaction ID :
C.		Primary General Other		Transaction ID :
D.		Primary General Other		Transaction ID :

11. Total Expenditures This Notice 200000.00

12. Total Expenditures Election Cycle To Date 930280.00

13. 48 Hour Notice of Last-Minute Contributions

b) Check box if this filing satisfies Form 6 filing requirements (see instructions)

b) Name of Employer: c) Occupation:

TYPE OR PRINT NAME OF COMMITTEE TREASURER
Alan J Davis

SIGNATURE OF COMMITTEE TREASURER DATE
08/24/2006

For further information contact:
Federal Election Commission 999 E Street, NW, Washington, DC 20463
Toll Free 800-424-9530, Local 202-694-1100

FPG030 FEC Form 10 (Rev. 09/2005)

106

APPELLANT'S BRIEF

663

85

84/18 No. 07-320

FILED
FEB 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JACK DAVIS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

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February 20, 2008

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QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002 created the so-called "Millionaires' Amendment." Congress purportedly enacted Section 319 to equalize the resources among congressional candidates utilizing personal funds for their campaigns and candidates relying mainly on contributed funds. Under the statute, when candidates for the United States House of Representatives exceed $350,000 in personal campaign expenditures, their opponents may be entitled to receive: (1) individual contributions at triple the statutory limit, from donors who have reached the limit for aggregate campaign donations; and (2) coordinated expenditures from party committees in excess of the statutory limit. To effectuate application of Section 319, the statute mandates burdensome disclosures for self-financed candidates, but not for their opponents if they do not self-finance. The questions presented are:

1. Whether the three-judge district court erred in finding that Congress's attempt to equalize a potential imbalance in resources among congressional candidates violates neither the First Amendment to the United States Constitution nor the equal protection component of the due process clause of the Fifth Amendment.

2. If equalizing a potential imbalance in resources among congressional candidates is constitutional, whether the statute accomplishes the stated purpose.

PARTIES TO THE PROCEEDING

Jack Davis is the appellant in this Court and was the plaintiff in the three-judge district court.

The Federal Election Commission is the appellee in this Court and was the defendant in the three-judge district court.

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IN THE

Supreme Court of the United States

No. 07-320

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the district court is reported at 501 F. Supp. 2d 22 (D.D.C. 2007).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment and the equal protection component of the due process clause of the Fifth Amendment to the United States Constitution are printed in the Appendix to the Jurisdictional Statement ("J.S. App.") at 20a. BCRA § 319 ("Section

319") (codified at 2 U.S.C. § 441a-1 and printed at J.S. App. 21a-26a) is printed at J.S. App. 27a-31a.

JURISDICTION

The decision of the district court was issued on August 9, 2007. Appellant filed his notice of appeal on August 16, 2007, and his jurisdictional statement was filed on September 7, 2007. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114 (2002); and 28 U.S.C. § 1253.

STATEMENT OF THE CASE

This is a First and Fifth Amendment facial challenge to the so-called "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 319, 116 Stat. 109-12 (2002) (codified as amended at 2 U.S.C. § 441a-1). Congress ostensibly enacted Section 319 to "level the playing-field" among United States House of Representatives candidates who utilize personal funds for their campaigns and those who rely primarily on contributed funds.

Section 319 is Congress's second attempt to regulate candidates' spending on their own campaigns. In 1972, the Federal Election Campaign Act ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431-455), as amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263, established limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." FECA § 608(a)(1).[1] In

[1] FECA imposed a $25,000 limit for most candidates for the House of Representatives.

Buckley v. Valeo, 424 U.S. 1, 54 (1976) (*per curiam*), this Court struck down those limits, holding that *any* ceiling on personal expenditures violates the First Amendment.[2] In 2002, Congress imposed new burdens on personal expenditures, creating an alternative system of higher contribution limits, strategy disclosure obligations, and other requirements in elections where one or more candidates spends a substantial amount of personal funds.

Federal election law generally applies uniform contribution limits and regulations to campaigns where all candidates rely on private contributions. BCRA § 319 ("Section 319"), however, confers advantages on the opponents of a candidate for the United States House of Representatives whose personal expenditures exceed $350,000, and also imposes additional reporting requirements that apply only to a self-financing candidate who *might* cross the $350,000 threshold.[3] Once a candidate's personal expenditures surpass that threshold, Section 319 may enable her opponents to match these expenditures by: (1) receiving contributions at triple the $2,300 per election limit, from donors who have already reached the $42,700 per election cycle limit for aggregate campaign donations; and (2) receiving *unlimited* coordinated party expenditures (normally subject to a $40,900 per election ceiling for most House races).[4] Congress also created a new reporting

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[2] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I.

[3] BCRA § 304(a) (2 U.S.C. § 441a(i)) applies parallel regulations to campaigns for the United States Senate. Appellant does not challenge this provision.

[4] These limits are indexed for inflation. Since BCRA's enactment in 2002, the individual contribution limit has in-

regime for candidates who intend to spend more than $350,000 of their own money, which requires the disclosure of their personal campaign expenditure plans.

In both 2004 and 2006, Appellant Jack Davis ran as the Democratic Party's nominee for New York's 26th Congressional District seat to the United States House of Representatives, challenging the Republican incumbent Thomas Reynolds. Mr. Davis funded his 2004 campaign primarily, though not exclusively, with personal expenditures. Mr. Davis spent over $1.2 million, but lost the 2004 election to Mr. Reynolds. *See* Davis FEC Form 3, J.A. 54; *Fed. Elections 2004: Election Results for the U.S. House of Representatives*, at 72, http://www.fec.gov/pubrec/fe2004/2004congresults.pdf. In 2006, the FEC began an investigation into alleged violations of Section 319 stemming from Mr. Davis's campaign committee's alleged failure to report his personal expenditures made during the 2004 campaign.[5] Aug 16, 2006 FEC Letter, Addendum ("Add.") 1a-2a. In January 2007, the FEC proposed a "conciliation agreement" in which Mr. Davis would pay a $251,000 civil penalty. Conciliation Agreement, Add. 8a. On August 27, 2007, Mr. Davis agreed to toll the statute of limitations for the action until final resolution of this case. *See* Consent, Add. 10a.

In 2006, Mr. Davis again challenged Mr. Reynolds. On June 28, 2006—prior to the start of the general election campaign and in anticipation of personally spending more than a million dollars—Mr. Davis

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creased from $2,000, 11 C.F.R. § 110.1(b)(1)(i),(ii), and the ceiling on coordinated party communication has increased from FECA's original $10,000 limit. 11 C.F.R. §§ 109.32(b)(ii), 110.17.

[5] Documents relating to the FEC's investigation are printed in an Addendum ("Add.") to this brief at Add. 1a-10a.

filed suit in United States District Court for the District of Columbia. *See* Complaint, J.A. 5. In his complaint and supporting declaration, Mr. Davis alleged that application of Section 319's disclosure requirements and expanded contribution limits to his race violated his First and Fifth Amendment rights. He requested that the court declare Section 319 unconstitutional and enjoin the FEC from enforcing the provision. *See* Complaint, J.A. 5; Davis Declaration, J.A. 20.

At the same time, Mr. Davis moved to expedite this case pursuant to BCRA § 403, which instructs the district court to "expedite to the greatest possible extent the disposition of the action and appeal." Mr. Davis asked the court to decide his claims before the September 12, 2006 start of the general election campaign. *See* Mot. to Expedite. The FEC opposed the request, asserting that it required extensive discovery to defend the matter.

On July 11, 2006, the district court granted Mr. Davis's application for a three-judge court. On July 28, the district court denied Mr. Davis's request to expedite, and set a briefing schedule. The parties filed cross-motions for summary judgment, and the district court heard oral argument on October 20, 2006. On August 9, 2007, the court granted the FEC's motion for summary judgment.

A. Section 319, the So-Called "Millionaires' Amendment." Congress enacted Section 319 to address a perceived disparity in resources. As one Senator explained, personal campaign spending makes it "more difficult for nonwealthy opponents to compete and to get their messages and their ideas across to the public." 147 Cong. Rec. S2536, S2538 (daily ed. Mar. 20, 2001) (Sen. DeWine). It also

identified a public perception "that someone today who is wealthy enough can buy a [congressional] seat." *Id.* at S2547 (Sen. DeWine).

To implement its remedy, Congress developed the means to compare opponents' respective financial data in an election campaign. These statutory formulae measure the pool of funds—comprised of personal expenditures and contributed funds—available to each candidate. If, under the formulae, a candidate relying primarily on contributions has received less money than his opponent's personal expenditures, Section 319 applies. The formulae first calculate "gross receipts," essentially the amount of private contributions received by a candidate. *See* 11 C.F.R. § 400.8. During an election cycle, this number may be calculated three separate times; the general election tally accounts for contributions received by December 31 of the year *before* the general election.[6] This amount remains fixed during the year of the general election. The formulae next measure the difference between these receipts and the respective amounts of personal funds expended by the candidates. This measure, which determines the amount of benefits available to a candidate, is called the "opposition personal funds amount" ("OPFA"). Because candidate committees' finances are in flux, Congress confronted measurement issues relating to the comparison of contributions and personal spending, when to authorize extra-limit funds, and how to determine when additional funds have eliminated the purported inequities in the race.

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[6] Section 319 applies to primary and general elections, differentiating only as to the schedule for making calculations. See 11 C.F.R. §§ 400.2; 400.10. The Statement of the Case addresses the general election provisions only.

1.a. Disclosure of Personal Expenditures. To utilize this regime, candidates require access to accurate, contemporaneous data about their opponents' personal expenditures. Before passage of Section 319, FECA's regulations provided for quarterly financial disclosures, with additional reports required near elections. *See* 11 C.F.R. pt. 104. To accelerate disclosure of personal spending, Congress imposed a 24-hour notification scheme, commencing at the start of a campaign. Candidates must "file a declaration [of intent] stating the total amount of expenditures from personal funds . . . that will exceed $350,000" within 15 days of declaring their candidacy. 2 U.S.C. § 441a-1(b)(1)(B). Candidates who do not intend to exceed the $350,000 threshold "may state the amount as $0." 11 C.F.R. § 400.20(a)(2). The requirement applies to the primary and general elections, respectively. If, at any time during an election, candidates make aggregate personal campaign expenditures in excess of the threshold amount of $350,000, they must, within 24 hours, file an "initial notification" with the FEC, each opponent, and the national party of each opponent. 2 U.S.C. § 441a-1(b)(1)(C); *see also* 11 C.F.R. § 400.21(b). This filing notifies their opponents that they may be eligible for Section 319's extra-limit funds.

For purposes of Section 319, the FEC defines personal expenditures as: (1) personal funds spent in support of a candidate's own campaign; (2) personal contributions or loans made to a candidate's campaign; (3) loans by any other person to a candidate's committee that are secured using the candidate's personal funds; and (4) "any obligation to make an expenditure from personal funds that is legally enforceable" against a candidate. 11 C.F.R. § 400.4(a)(1)-(4). If a candidate subsequently repays

personal expenditures or loans with contributed funds, Section 319 does not reduce its measure of her aggregate personal spending. *See, e.g.*, FEC Adv. Op. 2003-31 (Dec. 19, 2003) (no reduction in candidate's gross receipts advantage if personal loans are later repaid with contributions).

Exceeding the $350,000 personal spending threshold triggers the 24-hour notification requirement for aggregate personal expenditures of $10,000 or more.[7] 2 U.S.C. § 441a-1(b)(1)(D); *e.g.*, Davis FEC Form 10, J.A. 106. Candidates provide the date and amount of each personal expenditure made since the last notification and calculate aggregate personal expenditures for the election. *See* 11 C.F.R. § 400.23(c)-(d). Candidates disclose this information to the same entities that receive the Declaration of Intent form. 2 U.S.C. § 441a-1(b)(1)(F). All disclosure requirements persist through Election Day. *See* 11 C.F.R. §§ 400.20-25.

1.b. Disclosure of Receipt of Extra-Limit Contributions. Once a candidate determines that he is eligible for extra-limit funds, he must notify the FEC and his political party within 24 hours. 11 C.F.R. § 400.30(b). He files another notice when he is no longer eligible for additional benefits. *Id.* § 400.31(e)(1)(ii). The regulations do not, however, require a candidate receiving extra-limit funds to notify his opponents of his receipt or expenditure of those benefits.

2. Calculation of Available Extra-Limit Contributions. Candidates utilize the various notices to calculate whether, and to what amount, they may

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[7] Neither the threshold nor aggregate expenditure amount is indexed for inflation.

accept funds under the expanded limits. This is called the "opposition personal funds amount" ("OPFA"). 2 U.S.C. § 441a-1(a)(2); 11 C.F.R. § 400.10. The FEC dubbed this calculation the "Proportionality Provision." *See* Def. Mem. Summ. J. at 8-9. Similarly, the district court concluded that Section 319, and specifically the OPFA calculation, "provides a benefit to [a self-financed candidate's] opponent, thereby correcting a potential imbalance in resources available to each candidate." J.S. App. 9a. The opinion summarizes the OPFA calculation:

> [T]he opponent determines the amount of personal funds spent by each candidate (*i.e.*, the self-financed candidate and himself), adds 50% of the total funds raised by each candidate during the year prior to the election, and compares the totals. [2 U.S.C.] § 441a-1(a)(2). If the opponent's OPFA is above that of the self-financed candidate, he may not take advantage of the relaxed limits and coordinated expenditures. If it is not, then he may take advantage of the relaxed limits, but only until parity is achieved under the OPFA formula.

J.S. App. 4a. Because the OPFA, which determines the application of benefits, measures personal funds and contributions in significantly different ways, the formulae merit additional discussion.

2.a. "Amount of Personal Funds Spent by Each Candidate." Each time a self-financed candidate personally spends $10,000 or more, she must report the expenditures. 11 C.F.R. § 400.22(b). This notice authorizes her opponents to calculate (or recalculate) their OPFAs using her new aggregate personal expenditures. Accordingly, the OPFA formula ensures that the amount available to offset personal

spending increases after each additional expenditure. Opponents may match up to 100% of the personal funds spent, at which point their limits return to standard levels. *Id.* § 400.31(e).[8]

2.b. "50% of the Total Funds Raised by Each Candidate During the Year Prior to the Election." The OPFA measures contributions and personal funds differently. Section 319 measures only contributions that are received in the year preceding the year of the election, an amount that it designates as the "gross receipts advantage." 2 U.S.C. § 441a-1(a)(2)(B)(ii). During the 2008 election cycle, for example, the gross receipts advantage measures funds contributed to candidates' authorized committees during 2007. The calculation does not account for contributions left over from previous elections: funds known as the "war chest". *See, e.g.*, 147 Cong. Rec. S3183, S3195 (daily ed. Mar. 30, 2001) (Sen. Dodd) (discussing differential treatment of "incumbent's war chest [from] a challenger's personal wealth"). The gross receipts advantage also omits contributions received by candidates during the ten months before Election Day on November 4, 2008. From February 1, 2008, when the calculation is effective, through Election Day, the gross receipts advantage simply utilizes the "[a]ggregate amount of the gross receipts of the candidate's authorized committee . . . on December 31 of the year preceding the year in which the general election is held." *See* 11 C.F.R. § 400.10(b) (defining variables (e) and (f) of the general election OPFA).

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[8] Candidates must return all unused contributions received under Section 319 at the end of a campaign, or if their self-financed opponent withdraws from the race at any time. 11 C.F.R. § 400.53.

Section 319 further winnows the gross receipts advantage by segregating primary and general election contributions.[9] Accordingly, candidates utilize their total primary receipts on December 31, 2007 for calculations relating to their 2008 primary opponents and their total general receipts on that date for their general opponents. *E.g.*, Reynolds FEC Form 3Z-1, J.A. 62; *see also* 11 C.F.R. § 104.19(b)(2). The OPFA uses these totals, without further adjustment, for all calculations in the respective elections. 11 C.F.R. § 400.10. For example, a candidate who received no contributions designated for the general election between January 1, and December 31, 2007 would use "$0" for all 2008 OPFA general election calculations.

Finally, the statute halves the aggregate contributions before calculating the gross receipts advantage. *See id.* § 400.10(a)(3)(i). Personal expenditures are not reduced.

Ultimately, the gross receipts advantage measures a candidate's aggregate personal expenditures, plus: all contributions: (a) made to that candidate during the year preceding the year of the election; (b) that are designated for the applicable election; (c) totaled, and divided by half. *Id.* § 400.10. At its most basic, the OPFA formula operates as such: general election Candidate A receives $1 million in individual contributions to his general election account through December 31, 2007, which divided in half equals $500,000. His opponent, Candidate B, receives

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[9] Because FEC regulations permit candidates to redesignate unused primary funds for use in the general election, individuals generally designate contributions made in the year before the election year to the primary election. See 11 C.F.R. § 110.3(c)(3); *see, e.g.*, Reynolds FEC Form 3Z-1, J.A. 62.

$600,000 in individual contributions to her general election account, which divided in half equals $300,000; the difference of Candidate A's $500,000 and Candidate B's $300,000 is $200,000, providing the gross receipts advantage between the two candidates during the election. Because no candidate has exceeded the $350,000 personal expenditure threshold, Section 319's benefits are not applicable. Subsequently, Candidate B personally spends $350,000 on the general election and files her 24-hour notice. Candidate A may now recalculate his OPFA to account for this expenditure. The difference between Candidate B's personal spending ($350,000) and Candidate A's gross receipts advantage ($200,000) equals $150,000, which is the amount of extra-limit funds that Candidate A may receive.

3. Penalties and Enforcement. FECA provides for civil penalties for submission of false, erroneous, or incomplete information on any of the forms relating to Section 319. *See* 2 U.S.C. § 437g(a)(5), (6). Penalties may match the expenditures involved and double for "knowing and willful" violations. *Id.* § 437g(a)(6)(C). FECA also authorizes criminal penalties—including both fines and imprisonment for less than five years—for "knowing and willful" violations. *Id.* § 437g(d)(1)(A).

B. Application of Section 319 to Mr. Davis's 2004 and 2006 Election Campaigns.

During the 2006 campaign, Mr. Davis's opponent, incumbent Thomas Reynolds, did not avail himself of his right to raise extra-limit funds. Mot. to Dismiss or Affirm at 12. However, Mr. Reynolds still enjoyed the benefits, and Mr. Davis assumed the burdens, of the unilateral reporting requirements imposed on

Mr. Davis. Mr. Davis filed numerous 24-hour notifications of personal expenditures. *See Davis for Congress Disclosure Reports*, http://images.nictusa.com/cgi-bin/fecimg/?C00421909 (last visited Feb. 19, 2008). At the end of the 2006 campaign—including a primary in which he ran unopposed and the general election against Mr. Davis—Mr. Reynolds received over $4.2 million in contributions (and other financial benefits) and expended more than $5.1 million. He reported no personal expenditures. *See Reynolds for Congress, 2006 Amended Post-General Report, FEC Form 3*, at 2 (filed Feb. 15, 2007), http://images.nictusa.com/cgi-bin/fecimg/?_27950065152+0. At the beginning of the 2006 election cycle, Mr. Reynolds's war chest totaled approximately $1,149,000; he finished the election cycle with approximately $260,000 cash-on-hand. *Id.* During the same election, Mr. Davis reported spending about $2.3 million on the primary and general elections, with his personal expenditures accounting for all but about $126,000 of that total. *See Davis for Congress, 2006 Amended Post-General Report, FEC Form 3, at 2* (filed Mar. 10, 2007), http://images.nictusa.com/cgi-bin/fecimg/?_27930237960+0. He finished the election with $23,657 cash-on-hand. *Id.* Based on Mr. Davis's disclosures, Mr. Reynolds's OPFA at the conclusion of the campaign authorized him to receive $1,459,562.50 in Section 319 benefits. *See supra Reynolds Form 3.* Mr. Reynolds ultimately prevailed in 2006, winning reelection by a 52%-48% margin, receiving 109,257 votes to Mr. Davis's 100,914 votes. *See 2006 Official Election Results for U.S. House of Representatives*, at 61, http://www.fec.gov/pubrec/fe2006/2006house.pdf.

SUMMARY OF THE ARGUMENT

Section 319 infringes on the core political speech of self-financed candidates and violates their right to equal protection of the law. The provision targets a class of candidates who are exercising their fundamental right to pay for their own electoral efforts and diminishes the exercise of that right in a direct and substantial manner. Section 319 violates the First Amendment by compelling the publication of sensitive, strategic information relating to a self-financed candidate's personal expenditures and by enabling opposing candidates to benefit from those expenditures. This differential treatment of candidates for the same seat in the United States House of Representatives also offends the equal protection component of the due process clause of the Fifth Amendment. In both the 2004 and 2006 elections, Appellant Jack Davis suffered direct injury from the application of Section 319, and he retains a personal stake in the invalidation of that provision.

Section 319 favors incumbents by discouraging challengers from personally financing their campaigns. For those who remain undeterred, the statute punishes them for making personal expenditures by rewarding their opponents. Section 319 provides benefits to the opponents of candidates who personally spend more than $350,000 on their campaigns. The statute authorizes opponents of self-financed candidates to match personal spending with: (1) contributions at triple the $2,300 individual limit that do not apply toward a donor's aggregate election cycle contribution limit; and (2) unlimited coordinated national party communications (normally capped at $40,900 per candidate). To provide access to these benefits, the statute measures all personal

expenditures, within 24 hours, through Election Day. In contrast, the statute counts *only contributed funds received in the year before the year of the election.* Accordingly, it ignores both an incumbent's "war chest," stocked with excess funds from previous election cycles, and all additional contributions that she receives during the year of the election.

Although applied "evenhandedly," the availability of extra-limit funds also confers an advantage on incumbents. *See Buckley*, 424 U.S. at 31 n.33 ("[T]he appearance of fairness . . . may not reflect political reality."). Many self-financed candidates are challengers who do not have access to high dollar donors. Or, as in this matter, candidates self-finance to convey a campaign message of independence from lobbyists, large donors, and other political "insiders." In raising the ceiling for hard money contributions, Congress sought to dampen the influence of large personal expenditures that could offset the natural financial benefits of incumbency. See *id.* ("[I]t is axiomatic that an incumbent usually begins the race with significant advantages."). As this Court first recognized in *Buckley*, 424 U.S. at 32 n.37, incumbents receive the lion's share of "hard money" contributions. *See also McConnell v. FEC*, 540 U.S. 93, 249 (2003) ("Is it accidental, do you think, that incumbents raise about three times as much 'hard money' . . . as do their challengers?") (Scalia, J., concurring in part, dissenting in part). This Court also upheld a ceiling on party coordinated communications because it believed that the absence of limits would foster circumvention of individual contribution limits and result in the improper use of party funds. *See FEC v. Colo. Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 465 (2001); *see also id.* at 460 n.23 (incumbent may use

coordinated communications to "become a player beyond his own race" by raising money for others). Section 319 abolishes the limit on these communications, as well.

Congress crafted Section 319 to resemble a public financing regime. However, unlike such provisions, the statute does not substitute public funds for contributed money. Conversely, it promotes increased expenditures of the latter. Section 319 is also coercive because it provides potential self-financers with no beneficial option; they either forgo their constitutional right to fund their own campaigns or they provide opponents with financial benefits correlated to their personal expenditures.

Section 319 is a provision of significant complexity, in operation and in effect. *See McConnell*, 540 U.S. at 264 (Scalia, J., concurring in part, dissenting in part) (the "federal election campaign laws . . . are already . . . so voluminous, so detailed, so complex, that no ordinary citizen dare run for office . . . without hiring an expert adviser in the field."). Section 319's intricacies include, *inter alia*, multiple formulae applied differently in different years, significantly varied calculations and benefits for House and Senate candidates, and a burdensome reporting regime applicable to self-financers only. The hypothetical published by the FEC to "provide a better understanding" of the statute is over 8,000 words long. *See* 68 Fed. Reg. 3970, 3987-94 (Jan. 27, 2003).

Congress also larded Section 319 with invented terminology. "Opposition personal funds amount" ("OPFA") and "gross receipts advantage" are terms that provide little insight into their measure. Even Congress's chosen name for Section 319, the "Mil-

lionaires' Amendment," is a misnomer. The statute applies to any candidate contemplating expending personal funds, and the House provision is triggered after a candidate expends or secures a campaign loan of $350,000, a modest amount in the current electoral landscape.

Finally, Congress claimed a governmental and public interest in creating equality in races involving personal expenditures. But the statute leaves incumbents free to raise extra-limit funds even while maintaining a significant financial advantage over their opponents. In this case, the statute authorized the incumbent to receive over $1.4 million in extra-limit funds in the 2006 election, even though he had already outspent Mr. Davis by more than $3 million dollars. Even if this Court had recognized that "leveling the playing field" was an independent, sufficient governmental interest, Section 319 fails to advance that goal.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS MATTER BECAUSE APPLICATION OF SECTION 319 INJURED MR. DAVIS IN BOTH THE 2004 AND 2006 ELECTIONS AND HE RETAINS A "PERSONAL STAKE" IN ITS INVALIDATION.

Mr. Davis has suffered injuries-in-fact sufficient to confer Article III standing to challenge Section 319. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[10] As described in the Statement of the

[10] In its Motion to Dismiss or Affirm, the Government conceded that Section 319's notice and disclosure provisions injured Mr. Davis, but asserted that because his opponent did not avail himself of the increased contribution limits, Mr. Davis "has

Case, *see supra* p. 13, in both 2004 and 2006, Section 319 obligated Mr. Davis to provide a series of public disclosures, commencing with his Declaration of Intent to exceed the $350,000 personal expenditure limit, and continuing through Election Day. The injuries imposed by Section 319's disclosure regime are sufficient to confer standing on Mr. Davis to challenge the statute in its entirety.

First, the FEC has alleged that Mr. Davis failed to comply with Section 319's disclosure requirements during the 2004 election and seeks a significant monetary penalty. Add. 1a-9a. This pending action against Mr. Davis satisfies the test for standing articulated in *Lujan*, 504 U.S. at 560-61 (injury must be "concrete"). In the 2006 campaign, Mr. Davis suffered additional injury arising from his compliance with the statute's disclosure requirements. "This Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003) (*citing Buckley*, 424 U.S. at 64-68 (disclosure of campaign contributions)); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (disclosure of membership lists). Indeed, Mr. Davis filed this matter prior to the 2006 general election in order to avoid the unconstitutional burden imposed by these obligations.

His opponent's decision not to raise funds pursuant to Section 319 does not deprive Mr. Davis of standing to challenge the statute. Severability of a statute is

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identified no actual or imminent injury to himself resulting from that *aspect* of Section 319." Mot. to Dismiss or Affirm at 12 (emphasis added).

only appropriate where the invalidation of an unconstitutional provision does not affect the rest of the statute. The power to sever a statute exists only "on the basis of the Court's assessment as to whether Congress would have enacted the remainder of the law without the invalidated provision." *Miller v. Albright*, 523 U.S. 420, 457 (1998) (citations omitted); *see also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (severing a line-item veto provision because congressional intent to allow such severability was clear and remaining statute could operate independently).

Congress enacted Section 319 as a unified scheme involving the disclosure of personal expenditures and the establishment of alternative limits based on those disclosures. Without immediate access to information about a candidate's personal spending, opponents would be unable to use the formulae to calculate the availability of Section 319's extra-limit funds. Prior to the enactment of Section 319, no reporting mechanism existed to provide this data. Section 319's disclosure obligations cannot be separated from the monetary benefits contingent upon that disclosure.

Mr. Davis has also suffered significant injury due to the availability of the extra-limit funds to his opponent. Litigants have established Article III standing in cases with far more speculative injuries than are presented here. In *Shays v. FEC*, the plaintiffs had standing simply because they were candidates who were obligated to comply with a fundraising regime with which they disagreed. *See Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005) ("[T]he statute's regulation of candidates is part of the reason *why* candidates like Shays and Meehan

possess APA standing, for who suffers more directly when political rivals get elected using illegal financing?"). This Court has also recognized that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Lujan*, 504 U.S. at 578 (reaffirming this principle of standing). Were it not for Section 319, Mr. Davis would be free to make personal expenditures without conferring electoral advantages on his opponents.

Because the FEC maintains a pending enforcement action against Mr. Davis, stemming from his campaign committee's alleged failure to comply with Section 319 during the 2004 election, this case is not moot. Mr. Davis's "personal stake" in the constitutionality of Section 319 presents this Court with a live dispute that it is capable of resolving. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Separate from the FEC enforcement action, Mr. Davis's challenge falls within the "established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right to Life, Inc. ("WRTL")*, 127 S. Ct. 2652, 2662 (2007); *see also Storer v. Brown*, 415 U.S. 724, 737 n.12 (1974) (in electoral context the issues persist after conclusion of the elections). The limited period between elections does not leave "ample time" for litigation of electoral challenges. *WRTL*, 127 S. Ct. at 2662-63; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (challenge to a state referendum was not moot after the election, because the time between legislative approval of the measure and submission to the voters was too short a period

in which to litigate). Finding that Mr. Davis's claims are moot because they were not litigated within the 2006 election cycle would also thwart Congress's intention that challenges to BCRA should be expedited. *See* 2 U.S.C. § 437h; *WRTL*, 127 S. Ct. at 2662 (granting review to Wisconsin Right to Life, Inc. in light of "BCRA's command that the cases be expedited 'to the greatest possible extent,' § 403(a)(4).").

II. SECTION 319 UNCONSTITUTIONALLY BURDENS SELF-FINANCED CANDIDATES' POLITICAL SPEECH AND EXACERBATES INCUMBENTS' INHERENT ADVANTAGES.

Section 319 is Congress's second attempt to regulate personal spending. After *Buckley* struck down FECA's ceilings on personal expenditures, Congress responded with this BCRA provision expanding contribution limits for the opponents of self-financers. The district court, however, failed to examine whether Section 319 actually advances the purported equality interest. *See* J.S. App. 9a (Section 319 corrects a "potential imbalance in resources") and J.S. App. 17a (It is a "reasonable premise" that self-financers are "dangerous to the perception of electoral fairness."). This deference does not rise to the level of strict scrutiny. *See WRTL*, 127 S. Ct. at 2664 ("[T]he burden is on the government to show the existence of [a compelling] interest." (*quoting Bellotti*, 435 U.S. at 786 (footnote omitted))). Because the district court did not address Mr. Davis's claim that Section 319 creates an advantage for incumbents, its opinion is ill-suited to a matter "raising First Amendment issues, [where] we have repeatedly held that an appellate court has an obligation to 'make an

independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) *(quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964)). In its plurality opinion in *Randall*, this Court applied such scrutiny to limits set well below the norm. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (plurality opinion). Equal care should apply here.

A. Section 319 Favors Incumbents by Subverting Standard Contribution Limits and Increasing Financial Inequality.

Section 319 favors incumbents by providing informational and financial benefits to the opponents of candidates who personally spend more than $350,000 on their campaign. It provides advance strategic information about the self-financed candidate's budget and authorizes their opponents to match their personal spending with: (1) contributions at triple the $2,300 individual limit which do not apply to a donor's aggregate election cycle contribution ceiling; and (2) unlimited coordinated national party communications (normally capped at $40,900 per candidate). *See* 11 C.F.R. § 400.41.

The provision favors incumbents over challengers with the personal wealth sufficient to offset some of the financial advantages of incumbency. As Justice Scalia noted in *McConnell*, "*[a]ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents. . . . Is it accidental, do you think, that incumbents raise about three times as much 'hard

money'—the sort of funding generally *not* restricted by this legislation—as do their challengers?" *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). Section 319 exacerbates the advantages of incumbency. While it discounts the presence of incumbents' war chests, Section 319 does not provide additional money for challengers without access to a preexisting source of funds. The provision also ignores other advantages of incumbency, including: greater voter recognition, the ability to earmark funds for one's district, mail franking privileges, and paid travel for official duties. *See Buckley*, 424 U.S. at 31 n.33 (discussing advantages of incumbency). Addressing the Vermont campaign finance law's contribution and expenditure limits in *Randall*, Justice Breyer observed that the "typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent" created too many obstacles to challengers for the law to be constitutional. 126 S. Ct. at 2496 (plurality opinion). Section 319's advantages for those who already enjoy the benefits of incumbency similarly serve to make a challenger's burden heavier.

This boost to incumbents extends to the provision's disclosure triggers. For example, because neither the $350,000 personal expenditure threshold nor the $10,000 reporting level is indexed for inflation, "limits which are already suspiciously low . . . will become almost inevitably low over time . . . thereby impos[ing] the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to assure adequate financing of electoral challenges." *Randall*, 126 S. Ct. at 2499 (plurality opinion). In contrast, the standard contribution limits are adjusted for

inflation every two years. 11 C.F.R. § 110.1(b)(i), (ii). Thus, the thresholds for Section 319 decline, while the expanded contribution levels maintain their value.

By burdening self-financed challengers, Section 319 "*targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents," *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). Some members of Congress recognized the biases inherent in Section 319. One Senator stated that "[t]here is simply no way to justify treating an incumbent's war chest differently than a challenger's personal wealth . . . [there is] a substantial loophole for incumbents." 147 Cong. Rec. S3183, S3195 (daily ed. Mar. 30, 2001) (Sen. Dodd).[11] Another Senator concluded that this regime "flies in the face of McCain-Feingold. There is nothing in the spirit of McCain-Feingold in this amendment. This is not reform. This makes a mockery of reform." 147 Cong. Rec. S2536, S2544 (daily ed. Mar. 20, 2001) (Sen. Daschle).

B. Discouraging Personal Expenditures for the Benefit of Some Candidates is an Impermissible Legislative Purpose.

1. *Congress's Stated Governmental Interests are Novel and Unconstitutional.*

Congress originally imposed contribution limits in election campaigns to address concerns about the appearance and actuality that large campaign donations could unduly influence politicians. *See*

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[11] The Senate debate addressed BCRA § 304(a), enacting regulations for United States Senate elections parallel to Section 319.

Buckley, 424 U.S. at 26-28. Yet, Congress did not advance this interest in enacting Section 319. Even with evidence of the most sincere congressional intent to compensate for some inequality, this Court has repeatedly rejected campaign finance reforms that simply seek to "level the playing field" for all candidates. *See id.* at 48-49, 54 (no relevant interest exists in "equalizing the relative ability of individuals and groups to influence the outcome of elections"); *see also McConnell*, 540 U.S. at 138 n.40, 227 ("Less rigorous scrutiny [applied] to contribution restrictions aimed at the prevention of corruption" but no deference given when a statute is aimed at equalizing resources in the "political marketplace."). No decision by this Court—whether addressing contributions, disclosure requirements, or expenditure limits—has held otherwise. *McConnell* dismissed a previous challenge to, *inter alia*, Section 319 by individuals who asserted that the statute's increased limits "deprive[d] them of an equal opportunity to participate in the election process based on their economic status." 540 U.S. at 227. In finding that the appellants lacked standing, *McConnell* held that a claim of "curtailment of the scope of their participation in the electoral process" did not confer injury "fairly traceable" to the statute. *Id.* at 227, 230 (*citing FEC v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 257 (1986) ("Political free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."). *Randall's* plurality opinion continues the thread. In invalidating the Vermont campaign finance law's unconstitutionally restrictive contribution limits, the plurality opinion found that such limits exacted too great a burden on the First Amendment rights of contributors. *See*

126 S. Ct. at 2492 (contribution limits may create more harm than can be justified by purported anticorruption objectives).

Congress has also asserted a related interest in countering negative public perception about the integrity of the electoral process and eliminating wealth as a prerequisite for running for office. Certainly, this a congressional interest that "directly implicate[s] 'the integrity of our electoral process and, not less, the responsibility of the individual citizen for the successful function of that process.'" *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (*quoting United States v. Automobile Workers*, 352 U.S. 567, 570 (1957)). This Court, however, has never separated that interest from the corruption concerns articulated in *Buckley*. *WRTL* explained that, "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." 127 S. Ct. at 2672 (*quoting Buckley*, 424 U.S. at 26-27). Accordingly, this Court has found that uniform contribution limits, and to some extent expenditure limits, adequately address concerns about electoral integrity. *See WRTL*, 127 S. Ct. at 2672.

During debate, Senator McCain, the co-sponsor of BCRA, acknowledged that raising limits creates tension with preexisting regulations:

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. [Regulation of self-financers] does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual

> and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections.

148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (Sen. McCain). Congress provided a related justification for allowing some candidates to bypass the standard contribution scheme, "leveling the playing field" for all candidates, regardless of financial resources. Apparently, Congress determined that *Buckley's* rejection of a ceiling on personal expenditures, in tandem with its acceptance of generally applied contribution limits, created a financial disparity for candidates who rely primarily on contributions. *See* 147 Cong. Rec. S2536, S2536 (daily ed. Mar. 20, 2001) (Sen. Durbin) (discussing *Buckley*). As one Senator asserted, the provision is an "attempt to correct the inequities in the system and establish fairness in the process. . . . Proportionality is important because it really helps level the playing field from both directions so the wealthy candidate is not punished or is not inhibited. . . ." *Id.* at S2538 (Sen. DeWine).

Congress also expressed a concern about the "public perception that there is something inherently corrupt about a wealthy candidate who can use a substantial amount of his or personal resources to win an election." *Id.* "Many people believe that candidates are attempting to buy their way into office." 148 Cong. Rec. S2096, S2153 (daily ed. Mar. 20, 2001) (Sen. Domenici). The district court agreed, holding that this rationale justified the unequal treatment imposed by Section 319: "[T]he reasonable premise of the Millionaires' Amendment is that self-

financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." J.S. App. 17a.

Finally, members voiced concern that party recruitment of wealthy candidates prevents non-wealthy individuals from participating in elections. *See* 147 Cong. Rec. S2433, S2464 (daily ed. Mar. 19, 2001) (Sen. Sessions). As one member stated: "Running for office has become increasingly expensive, forcing candidates to spend unacceptable amounts of time fundraising, and discouraging qualified challengers from running for office because they cannot afford the price of admission." 148 Cong. Rec. H339, H351 (daily ed. Feb. 13, 2002) (Rep. Kind).

No member of Congress offered justification for Section 319's compelled disclosure of self-financed candidates' strategic spending plans.

2. *None of the Equality Interests Expressed by Congress is Compelling.*

In disavowing any interest in the actuality or appearance of *quid pro quo* corruption, Congress disregarded the only sanctioned justification for regulation of political speech. Congress's purported interest in "leveling the playing field" is neither a legitimate, nor compelling, governmental interest. Section 319 provides a conflicting message to candidates and voters. First, Congress asserts that the statute promotes "equality" by permitting an increase in contributed funds for some "underfunded" candidates. Yet for this limited purpose, it maintains that these increased limits—normally deemed "cor-

ruptive"—actually decrease influence and buttress the integrity of the electoral process. Congress "put more money into the political system . . . [and] the effect of that money will be to enhance the first amendment." 147 Cong. Rec. S2536, S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine). However, Congress fails to explain how Section 319 transmutes purportedly corruptive contributions into ameliorative ones. Neither Congress nor the district court explains why a legitimate congressional response to "core" protected political expression is the authorization of contributions and expenditures which, in every other circumstance, allegedly increase the influence of donors and the appearance of corruption. If application of uniform limits addresses the corrupting influence of campaign donations, higher limits made available only to the candidates supposedly most susceptible to corruption cannot be the appropriate response to benign personal expenditures.

By its operation, Section 319 also conveys Congress's belief that more than $350,000 in personal expenditures in an election is deleterious speech. "[I]t is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Buckley*, 424 U.S. at 17 (*quoting United States v. O'Brien*, 391 U.S. 367, 382 (1968)). Yet, it is hard to reconcile Section 319's burden on personal spending with *Buckley's* holding that "the use of personal funds reduces the candidate's dependence on the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed." *Id.* at 53.

Finally, Congress asserted that Section 319 lowers barriers to entry for candidates without substantial personal wealth. Again, because the statute raises or abolishes the ceilings on contributions to candidates and thus encourages more spending, it does not reduce the amount of money necessary (whether personal or contributed) to run a competitive campaign. It may, in some situations, encourage a spending battle between a candidate with a sizable personal fortune and one with a sizable war chest, to the detriment of those candidates without access to large amounts of money from either source. One Senator commented that any equality interest was specious: "The contest is between the wealthy with financial resources versus the people who have access and are dependent upon the wealthy with financial resources." 147 Cong. Rec. S2536, S2544 (daily ed. Mar. 20, 2001) (Sen. Wellstone).

In sum, Section 319's unmistakable message is that personal expenditures over $350,000 in a House race detrimentally effect voters and elections in general. Congress, by making this determination, has run afoul of this Court's admonition in *Brown v. Hartlage* that the government's "fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to 'select which issues are worth discussing or debating,' *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), in the course of a political campaign." *Brown v. Hartlage*, 456 U.S. 45, 59-60 (1982).

C. Section 319 Has a Negative Effect on Democracy Because It Does Not Serve an Anticorruption Interest and Increases the Public Perception of Corruption in the Electoral System.

Congress expressed concern that the supposed increased participation of wealthy candidates creates the public perception that great wealth is a prerequisite for access to a House seat. However, Section 319 does not address this issue. Indeed, by raising the contribution limits for some candidates, the statute is likely to increase the total amount of money ultimately spent on campaigns. As such, Congress has exacerbated the problem that it purportedly tried to solve.

Addressing *quid pro quo* corruption remains the only accepted justification for campaign finance restrictions. *See WRTL*, 127 S. Ct. at 2676-78 (Scalia, J., concurring in part, concurring in the judgment) (discussing Supreme Court jurisprudence regarding corruption).

Section 319 advances no anticorruption interest. *See* 148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (Sen. McCain) (Congress "relax[ed]" limits to "mitigate" influence of personal expenditures). Rather, the provision allows wealthy donors to subvert limits regulating both contributions to individual candidates and the donors' aggregate contribution levels. The only way for candidates to garner Section 319's extra-limit funds is to solicit more money from donors who have already reached the standard limits, and have likely made similar contributions in previous elections. But the entire justification for contribution limits is to free candidates from the influence of a few wealthy donors.

See, e.g., Buckley, 424 U.S. at 26-28. By allowing select candidates and donors to bypass the standard campaign finance regulations, Congress undermines its assertion that contribution limits are the best tool to combat the perception of corruption in the electoral system.

Abolishing the coordinated party expenditure limits may also increase circumvention of individual contribution limits. *Colorado II* held that "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." 533 U.S. at 464; *see also id.* at 458-59. "[T]here is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." *Id.* at 464.[12] Apart from any putative corruptive effect, this Court also received evidence that incumbents use coordinated communications to fund other candidates and "increase personal power and a claim to party leadership." *Id.* at 460 n.23. Unlimited funds for coordinated communication accentuate this perk of incumbency.

D. In Scrutinizing Section 319, This Court Need Not Defer to Incumbents Who Legislate to Serve Their Own Interests.

Section 319 preserves the power of incumbents at the expense of fairness in the political system. "'The first instinct of power is the retention of power,' and those who hold public office can be expected to attempt to insulate themselves from meaningful electoral review." *Miller v. Cunningham*, 2007 U.S.

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[12] The dissent in *Colorado II* expressed skepticism about the harmful effects of unlimited coordinated spending. *See* 533 U.S. at 481-82 (Thomas, J., dissenting)

App. LEXIS 29882, *13 (4th Cir. Dec. 20, 2007) (Wilkinson, J., dissenting from the denial of rehearing en banc) (*quoting McConnell*, 540 U.S. at 263 (Scalia, J., concurring in part, dissenting in part)). In the case of incumbents, and "under a Constitution that requires periodic elections, [retention of power] is best achieved by the suppression of election-time speech," *McConnell*, 540 U.S. at 263 (Scalia, J., concurring in part, dissenting in part), particularly the speech of candidates who possess the financial resources to challenge those in power. Generally, Congress is afforded some deference in its legislative determinations, but Section 319 does not deserve such respect: "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgment—*at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.*" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (emphasis added).

It is not dispositive that, on its face, Section 319 applies to all candidates. Despite the presence of *higher* expenditure limits for challengers, the *Randall* plurality opinion found that excessively low contribution limits imposed too great a financial burden on challengers to be constitutional. 126 S. Ct. at 2495-96. As Justice Scalia has observed:

> If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, *any* restriction upon a type of campaign

> speech that is equally available to challengers and incumbents tends to favor incumbents.

McConnell, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). The Committee on House Administration's Adverse Report reveals Congress's view of the regulation. The report, issued prior to the insertion of Section 319 into BCRA, laments its absence: "Senate candidates receive more preferential treatment in the form of a "millionaire's amendment" . . . House candidates who find themselves in a race against a wealthy opponent receive no such relief." H.R. Rept. No. 107-131 (Pt. 1), July 10, 2001 (accompanying H.R. 2356). Although the provision applies evenhandedly, Congress had no ambivalence about its operation.

III. SECTION 319'S ENTIRE FINANCING SCHEME, ENACTED TO "LEVEL THE PLAYING FIELD," VIOLATES THE FIRST AMENDMENT.

A. Personal Campaign Spending is "Core" First Amendment Speech.

In regulating personal spending by candidates, Section 319 punishes what this Court has described as "political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (*quoting Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Section 319 seeks to discourage the use of, and diminish the effectiveness of, personal campaign expenditures, ostensibly to "level the playing field" among opposing candidates for Congress. Under Justice Kennedy's framework, last articulated in his concurrence in *Republican*

Party of Minnesota v. White, this Court would require no further analysis to strike down Section 319:

> [C]ontent-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (*quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in judgment)).

Even employing its traditional inquiry into tailoring and governmental interests, this Court has repeatedly invalidated regulations, like Section 319, that diminish core political speech. Again, this Court has never found that a governmental interest in equality alone constitutes a compelling justification for the infringement of political speech.

Buckley struck down a ceiling on personal expenditures that "clearly and directly interfere[d] with constitutionally protected freedoms":

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53. Personal expenditure limitations impose a "substantial restraint on the ability of persons to engage in protected First Amendment expression." *Id.* at 52. Further, "prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds." *Id.* at 53. *Buckley* also established that although contribution limitations implicate First Amendment rights of free speech and free association, restrictions on expenditures are "significantly more severe." *See id.* at 19-23. In contrast to ceilings for individual contributions, limits on personal expenditures actually "reduce[] the candidate's dependence on outside contributions and thereby counteract[] the coercive pressures and attendant risks of abuse to which the Act's contributions limitations are directed." *Id.* at 53. As recently as its plurality opinion in *Randall*, this Court reaffirmed that limitations on personal campaign spending infringe upon the core of political speech protected by the First Amendment. *See* 126 S. Ct. at 2490-91.

B. Section 319's Reporting Requirements Impose a Substantial Burden on Political Expression by Compelling Disclosure of Campaign Strategy.

Section 319 burdens protected First Amendment rights to political expression by compelling intrusive and unilateral reporting obligations on candidates who contemplate spending substantial personal funds on their campaign. And upon exceeding the $350,000 personal expenditure threshold, the reporting burden grows heavier.

No less than direct regulation, "compelled disclosure [of political activities], in itself, can seriously infringe" on First Amendment guarantees. *Buckley*, 424 U.S. at 64. *Buckley* held that a governmental interest in disclosure of campaign finance data is permissible *only* when the requirement is necessary to: (1) enable the voting public to place each candidate along the political spectrum by alerting it to the interests to which the candidate is likely to be responsive; (2) deter both corruption and the appearance of corruption by exposing large contributions and expenditures to scrutiny; and (3) detect violations and enforce the previous two interests. 424 U.S. at 66-67. For example, in *McConnell,* this Court upheld BCRA's notice and disclosure requirement for executory contracts for electioneering communications, 540 U.S. at 201, reasoning that the regulation addressed both a corruption interest and provided voters with information about the entity making the communication. *Id.* at 196-97. This Court has recognized however, that additional burdensome disclosure regulations may "create a disincentive" to engage in political speech. *MCFL*, 479 U.S. at 254 n.7.

Section 319's Declaration of Intent satisfies no legitimate interests and is particularly burdensome. Self-financed candidates are required to disclose planned personal expenditures for both the primary and general elections. *See* 11 C.F.R. § 400.20(a)(2). In *McConnell*, this Court acknowledged that the First Amendment contemplates "some form of protection against premature disclosure of campaign strategy." 540 U.S. at 242-43. This information is protected speech, because candidates, including those who are merely contemplating spending personal funds, must reveal their strategy to all potential primary and general election opponents. This disclosure details a candidate's most sensitive, confidential campaign information. Publishing the information assists opponents in tailoring their own fund-raising, expenditure, and campaign strategies, while self-financers receive no opportunity to anticipate their opponents' financial plans.

Moreover, a candidate's Declaration of Intent must reveal the amount by which she "intends to exceed the threshold amount." *Id.* § 400.20(b)(2).[13] This requirement, at the campaign's outset, forces the self-financed candidate to publicize his campaign strategy. *See AFL-CIO*, 333 F.3d at 176 (Even where disclosure to the government may be necessary, "'compelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986)). Because self-financers are the only candidates reporting at the start of the campaign, disclosure does not enable the voting

[13] As with all disclosures, this statement is subject to the FEC's civil and criminal enforcement rules. *See* 2 U.S.C. §§ 437g(a)(5), (6), 437g(d)(1)(A).

public to "place each candidate in the political spectrum" by alerting it to the interests to which candidates are likely to be responsive. *Buckley*, 424 U.S. at 67.[14] If Congress intended to deter pre-campaign corruption, it did not achieve this end by subjecting only self-financed candidates' strategies to public scrutiny. *See id.*

The aggregate $10,000 expenditure disclosure requirement provides no informational benefit either, because, like all candidates, a self-financer files standard quarterly and pre-election FEC reports disclosing total personal expenditures. *See* 11 C.F.R. pt. 104. Yet contemporaneous notification of personal expenditures subjects contribution-financed candidates to a significant burden. In the 2006 election, $10,000 represented a modest sum in competitive House campaigns. *See The Campaign Finance Institute*, Tbl. 3-1: The Cost of Winning an Election, 1986-2006, http://www.cfinst.org/data/pdf/VitalStats_t1.pdf (last visited Feb. 19, 2008). In Mr. Davis's race in 2006, the candidates combined to spend over seven million dollars. See *supra* p. 13. An aggregate $10,000 reporting threshold imposes a continual reporting burden on the self-financed candidate. Although all candidates do share some

[14] It is particularly quixotic that a candidate who chooses to spend less than $350,000 need only indicate "$0" on her Declaration of Intent. *See, e.g.*, Davis FEC Form 2, J.A. 103. This belies any informational rationale for early disclosure of a candidate's intent to make personal expenditures. Full disclosure would require accurate statements of self-financing by all candidates, not merely those who may exceed the statute's $350,000 threshold.

reporting burdens,[15] the self-financed candidate bears the most intrusive responsibilities.

The district court concluded that Mr. Davis's complaint focused on Section 319's "timing deadlines." J.S. App. 16a. Burdensome as the 24-hour reporting rule may be, timing is not Section 319's primary flaw. The self-financer's unilateral disclosure of sensitive campaign strategy disclosure directly infringes his First Amendment rights.

C. Section 319's Differential Treatment of Opposing Candidates Violates the First Amendment.

To the extent that Section 319 burdens a self-financed candidate's campaign, or enhances her opponent's campaign, the self-financed candidate's political speech is impaired. In *New York Times Co.*, 376 U.S. at 270, this Court spoke of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." This Court has subsequently held that "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (rejecting tax on paper and ink that only applied to large newspapers); *Mosley*, 408 U.S. at 95-96 (rejecting picketing ordnance that distinguished between peaceful labor picketing and other peaceful

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[15] In the last 20 days of a campaign, all candidates must report, within 48 hours, the receipt of all contributions of $1,000 or more. See 11 C.F.R. § 104.5(f).

picketing).[16] In the context of political speech, this Court has rejected any attempt to govern the messages of candidates for elected office:

> Th[e First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to "select which issues are worth discussing or debating" in the course of a political campaign.

Hartlage, 456 U.S. at 60 (citation omitted). Section 319 does not regulate candidates who do not expend personal funds on their election (or spend less than $350,000); it applies only when the candidate exceeds the threshold. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57 (discussing FECA's expenditure limits).

Section 319 subjects candidates' speech to differential regulation. Self-financed candidates use one set of contribution limits, while their opponents campaign with a higher ceiling. A candidate's additional expenditure of personal funds allows her opponents to raise additional funds in excess of the standard limits. As such, a self-financed candidate's speech amplifies her opponent's voice as well.

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[16] The government has "no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

Congress asserted that Section 319 does not penalize self-financed candidates because it imposes no ceiling on expenditures, and, by authorizing higher contributions for some candidates, similarly encourages more political speech. *See* 147 Cong. Rec. S2536, S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine). This claim ignores the realities of any competitive election campaign. *See also* J.S. App. 13a (Davis "has failed to show that his speech has been limited in any way because of the benefits the Amendment provides his opponent."). That the burden is not an absolute limit does not mitigate the harm. The First Amendment does not permit state regulation to burden speech so long as speakers "remain free to employ other means to disseminate their ideas." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). While it may be less burdensome for some candidates to fund their own campaigns than to rely on contributions, that choice should be of no concern to the government. The First Amendment "protects" a self-financed candidate's "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* "Such notions run afoul of 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" *WRTL*, 127 S. Ct. at 2671-72 n.9 (*quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)).

In striking down FECA's personal expenditure limits, *Buckley* rejected the "wholly foreign" idea "that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. By providing an avenue for candidates to benefit from their opponents' personal expenditures, Section 319

resembles the "right of reply" provision struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (rejecting law granting candidates right to equal space to answer criticism and attacks by newspapers). The First Amendment does not permit Congress to choose sides in a political forum. *See Bellotti*, 435 U.S. at 785-86 (Where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.") (footnote omitted).

Application of this one-sided benefit will discourage or "chill" some self-financed candidates from making personal expenditures.[17] In *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), the Eighth Circuit struck down a similarly structured law affecting independent expenditures in Minnesota state campaigns. Under that provision, when an entity made independent expenditures on behalf of one candidate, his opponents received: (1) corresponding increases in their independent expenditure limits; and (2) matching funds from the state campaign commission, if they otherwise qualified. *See id.* at 1360.

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[17] It is true, as the district court recognized, that Mr. Davis spent significant personal funds on his campaigns, and, thus, may be hard-pressed to argue that Section 319 "chilled" his speech. J.S. App. 14a. However, despite the significant personal expenditures, his opponent outspent Mr. Davis by more than a 5 to 2 ratio. And despite this significant financial advantage, Section 319 authorized his opponent to collect approximately $1.4 million more in statutory benefits. See *supra* p.13. As such, it is not unreasonable for a candidate who has exceeded the threshold to curtail additional personal spending because of concerns that he will eventually spur his opponent to utilize Section 319's benefits.

Assessing these benefits, the Eighth Circuit found that "the knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech." *Id.* As with the provision in *Day,* Section 319 improperly "enhance[s] the relative voice" of self-financed candidates' opponents. *Buckley*, 424 U.S. at 48-49.

Finally, candidates who are dissuaded by Section 319 from making expenditures in excess of the $350,000 threshold are also burdened because they abandon their right to make unlimited expenditures on their own behalf. As such, Section 319 may reduce the "total quantum of speech," *Meyer*, 486 U.S. at 423, in an election.

D. Section 319 is Subject to Strict Scrutiny Because it Burdens Political Expression.

Because Section 319 regulates a self-financed candidate's speech on his own behalf, it burdens political speech and is subject to strict scrutiny. *See WRTL,* 127 S. Ct. at 2664. Regulations of "pure speech" applying "evenhandedly to advocates of differing viewpoints" can constitute "direct regulation of the content of speech." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (applying exacting scrutiny to anonymous speech ban); *see also Burson v. Freeman*, 504 U.S. 191, 198 (1992) (applying exacting scrutiny to law forbidding campaign-related speech within 100 feet of a polling place); *see also id.* at 212-13 (Kennedy, J., concurring); *id* at 217 (Stevens, J., dissenting). This Court applies the "most exacting scrutiny to regulations that suppress,

disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FEC*, 512 U.S. 622, 642 (1994). For purposes of disclosure, there must be a "relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." 424 U.S. at 64 (footnotes and quotations omitted). Such scrutiny applies even when the "deterrent effect on the exercise of First Amendment rights arises . . . indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

This Court should apply a content-based standard of review because Section 319 regulates speech based on its content. The trigger for regulation is self-funded, core political speech by a candidate promoting his candidacy. His funding of speech unrelated to his candidacy, at the same expenditure levels, would not trigger regulation. For example, he could produce a documentary or finance a publication on a political issue without being subjected to regulation. Nor would the provision apply to the funding of his campaign speech with an equivalent amount of contributed money. Therefore, Section 319 imposes a content-based regulation.

A "candidate's expenditure of his personal funds directly facilitates his own political speech," *Buckley*, 424 U.S. at 52 n.58, and the candidate has a "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Id.* at 52. Both the content and the financial basis of a candidate's communication constitute protected expression, particularly in the context of a winner-take-all election. In Mr. Davis's campaigns—as with many candidates

who forgo substantial reliance on private contributions—his expenditures and public statements conveyed the complementary message that he will best represent the electorate because he is not beholden to individual, party, and committee donors. *See* Davis Second Declaration, J.A. 31, ¶ 5. As such, a self-financed candidate's personal spending not only conveys his general electoral message, it is often an integral element of that message.

It is irrelevant that Section 319 imposes no ceiling on personal expenditures. "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000).[18]

Because Section 319 is a direct regulation of political speech at the "core" of the First Amendment, this case "'involves a limitation on political expression subject to exacting scrutiny.'" *McIntyre*, 514 U.S. at 346 (*quoting Meyer*, 486 U.S. at 420). As such, Section 319 can survive a constitutional challenge only if the government can show that it is narrowly drawn to serve a compelling state interest. *See WRTL*, 127 S. Ct. at 2664; *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also Bellotti*, 435 U.S. at 786.[19]

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[18] In his concurrence in *Republican Party of Minn. v. White*, Justice Kennedy maintained that all content-based restrictions "that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests." 536 U.S. at 793.

[19] Section 319 is also susceptible to a facial challenge. While the availability of expanded limits varies depending on the

IV. SECTION 319 IS NOT NARROWLY TAILORED TO ADDRESS A COMPELLING STATE INTEREST.

Because Section 319 burdens political speech at the core of the First Amendment it must be narrowly tailored to address a compelling state interest. *WRTL*, 127 S. Ct. at 2664. In scrutinizing state regulation of expression, this Court has applied "rigorous constitutional standards. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Erznoznik v. Jacksonville*, 422 U.S. 205, 217-18 (1975). To meet this standard, Section 319 must satisfy three conditions: it must be "necessary," *Buckley*, 424 U.S. at 44-47; be neither "overinclusive" nor "underinclusive," *compare Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991) (regulation not narrowly tailored if it is overinclusive) *with Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (underinclusive); and constitute the least restrictive means available, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *MCFL*, 479 U.S. at 262. The Eighth Circuit stated that the "seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as

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statute's assessment of the candidates' financial status, application of those benefits is governed by defined formulae. *See* 11 C.F.R. § 400.10. Accordingly, this Court can readily discern the consequences of any hypothetical. No additional insight into Section 319 would be gained by a "case-by-case analysis of the fact situations." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

precisely tailored as possible." *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

Congress expressed three related interests in enacting Section 319: (1) creating a "level playing field" for all House candidates; (2) combating the public perception that wealthy individuals can buy their way into the electoral process by spending large sums of their own money; and (3) lowering barriers of entry to the electoral system. *See, supra* p. 21. But while these may be weighty general concerns about the integrity of the political system, Section 319 is not narrowly tailored to address any of them.

A. Section 319 is Not Narrowly Tailored to Foster Equality.

The district court afforded significant deference to Congress's stated interests, an approach that does not satisfy the burdens demanded by strict scrutiny. *See WRTL*, 127 S. Ct. at 2664; *see supra* p. 21. Where "danger signs, that such risks [of incumbent advantage] exist (both present in kind and likely serious in degree), courts . . . must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Randall*, 126 S. Ct. at 2492 (plurality opinion).

1. *Because it Accounts for Personal Expenditures and Contributed Funds Differently, Section 319 Is Underinclusive.*

Section 319 does not foster equality because it does not accurately account for all sources of funds available to candidates. "Exemptions from an otherwise legitimate regulation of a medium of

speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *see also Florida Star*, 491 U.S. at 540 (facial underinclusiveness of a statute "raises serious doubts" about whether the statute actually serves the state's purported interest).

a. Section 319 is Not Narrowly Tailored Because It Does Not Account for Significant Sources of Contributed Funds.

In determining the extra-limit funds available to each candidate, the OPFA calculation measures every dollar employed by a substantial self-financer. The OPFA presumes, however, that all candidates begin the election cycle with no contributed funds on hand. Discussing this provision, Justice Scalia asked:

> Is it an oversight, do you suppose, that the so-called "millionaire provisions" raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election "war chest"?

McConnell, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). Mr. Davis's opponent began the 2006 election cycle with a $1.15 million war chest, yet Section 319 authorized him to raise and spend about $1.4 million more under the increased

limits. *See* Reynolds FEC Form 3Z-1, J.A. 62; *see also supra* at p. 13.

By ignoring war chests, and all contributions made during the year of the election, and by halving the funds that it does recognize, Section 319 ignores a significant proportion (arguably the majority) of contributions made to candidates. Given Congress's concerns about "leveling the playing field," these omissions are unjustifiable and do not evince narrow tailoring. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring in part, concurring in judgment) (quotation and citation omitted); *see also White,* 536 U.S. at 783 ("[T]he announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms."). Section 319 does not accurately measure the relative wealth of opponents in the same race. To achieve even rough equality, the statute would have to account for all available sources of campaign funds in a consistent and contemporaneous manner.

The statute also fails to reach candidates who make personal expenditures but remain below the $350,000 threshold. Congress did not explain why a candidate who spends $349,999 creates different equality concerns than one who spends one dollar more.

b. Section 319 Does Not Create Equality for Candidates Without Access to Large Donors or National Political Parties.

For all of its discussion of equality, Section 319 provides no aid for candidates who rely on small donors and do not have large national parties supporting them. In "leveling the playing field," Congress did not address why these candidates need less assistance than those who can solicit extra-limit contributions. If this concept of equality is narrowly tailored, Congress could, in the name of fairness, adjust contribution limits for any group of candidates that it deemed worthy of assistance.

c. Section 319 Does Not Regulate Political Expression from Other Sources.

While Section 319 burdens personal spending for equality purposes in one's own election campaign, it does not address individuals who spend personal funds on behalf of others. In *Buckley,* this Court found that independent expenditures merit the highest protection as "core First Amendment expression." 424 U.S. at 48. While independent expenditures are not the functional equivalent of a candidate's own speech, *id.* at 47, Section 319 treats a candidate's message with less deference than that of an outside party. This cannot be what *Buckley* intended in prescribing an "unfettered opportunity" for a candidate to "vigorously and tirelessly advocate . . . his own election." *Id.* at 52-53.

Section 319 also omits other sources of political communication that may influence the financial equities of an election. For example, it provides no

assistance for opponents of a candidate who receives a celebrity endorsement, which may generate significant public and media attention to a campaign and encourage additional contributions to the endorsed candidate.

2. Section 319 is Not the Least Restrictive Alternative for Regulating Political Speech.

Section 319 does not constitute the least restrictive alternative to addressing the "problem" of self-financed candidates. "Absent a showing that the proposed less restrictive alternative would not be as effective . . . the more restrictive option preferred by Congress [can]not survive strict scrutiny." *Playboy Entm't Group, Inc.*, 529 U.S. at 826 (reversing adult programming regulation because "[t]he record is silent as to the comparative effectiveness of the two alternatives").

For example, the Declaration of Intent disclosure identifying candidates who intend to self-finance is not the least restrictive alternative. *See* 11 C.F.R. § 400.20. Given that Section 319 requires immediate notification once a self-financed candidate has reached the $350,000 threshold, *id.* § 400.21(b), it is unclear what purpose the earlier declaration serves. Nor does the $350,000 threshold constitute the least restrictive means to determine which candidates are too "wealthy" for an equitable election. Congress provided no basis for setting the threshold at $350,000. In 2002, when Congress enacted BRCA, that amount represented approximately one-third of the cost of the average winning House race. *See supra* The Campaign Finance Institute, Tbl. 3-1: *The Cost of Winning an Election, 1986-2006* (average cost

of House race in 2002 was about $912,000). For the 2006 election, the threshold amount covered about 27% of the $1.26 million average cost. *Id; see also supra* p. 23 (discussing indexing). As the $350,000 threshold declines in relative value in future election cycles, Section 319 will only become more and more restrictive.

V. SECTION 319 DOES NOT ADVANCE LEGITIMATE ELECTORAL INTERESTS IN THE SAME MANNER AS A PUBLIC FUNDING REGIME.

The district court found that Section 319's expanded limits "correct[] a potential imbalance in resources available to each candidate" and that Section 319 "is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns." J.S. App. 9a-10a (citing precedent upholding public financing schemes). The decision ignores the significant functional distinction between the two funding regimes and disregards Section 319's coercive effect, not present in any constitutional public funding provision.

Buckley held that public funding generally does not infringe on the First Amendment because such schemes represent a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." 424 U.S. at 92-93; *see also Daggett v. Committee on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (Public funding "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political

speech, nor does it threaten censure or penalty for such expenditures."). "Public funding for candidates of major parties is intended as a substitute for private contributions," *Buckley*, 424 U.S. at 98, and as a "means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.

Section 319 involves no public funds, providing, instead, an avenue for more private money to enter the system. A competitive candidate contemplating self-financing can either stay under the threshold and rely more heavily on contributed funds or exceed the threshold and authorize opponents to match personal expenditures with extra-limit funds. In either case, Section 319 likely increases the amount and influence of contributed funds in an election. In Mr. Davis's 2006 race, for example, his opponent spent over $5 million in contributed funds to win reelection. *See supra* p. 13. Had he not exceeded the $350,000 personal expenditure threshold, Mr. Davis would have required millions of dollars in private contributions to remain competitive in the race.

The district court correctly noted that a public funding system does not pose an unconstitutional burden "where the disadvantage is the result of the candidate's choice to fund his campaign from one of several permissible funding sources." J.S. App. 12a. (*quoting Buckley*, 424 U.S. at 57 n.65 ("Just as a candidate may voluntarily limit the size of contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.")). "The issue is whether a candidate who faces a choice not to limit her full access to political speech will be any worse off in choosing to do so." *Rosentiel v. Rodriguez*, 101 F.3d 1544, 1560-61 (8th Cir. 1996) (Lay, J., dissenting). Thus, the court held that

Section 319 does not infringe on speech because a candidate's decision to exceed the personal spending threshold is a *choice* which provides a basis for the government to authorize his opponents to benefit from the expanded limits. However, Section 319 provides a self-financed candidate with no beneficial option. It either coerces him to forgo political expression in the form of personal campaign expenditures or burdens his full exercise of that right.

Buckley also held that a public funding scheme must provide "countervailing" benefits and burdens for all candidates. 424 U.S. at 94-96. "[A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling" and refusal of, or the failure to qualify for, such funding frees candidates from these limitations. *Id.* at 95. *See also Daggett*, 205 F.3d at 467 (The appropriate First Amendment benchmark is "whether the system allows candidates to make a 'voluntary' choice about whether to pursue public funding.") (quotation omitted); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38-39 (1st Cir. 1993) (same). Unlike recipients of public funds, however, self-financed candidates receive no countervailing benefits in return for their burdens. According to the district court, candidates who limit spending to the threshold amount benefit because their opponents do not receive funds at Section 319's higher ceilings. J.S. App 11a-12a. In the context of the campaign finance system, imposition of the standard contribution limits on one's opponents—limits that are uniformly applied to all other candidates—confers no benefit; it simply preserves the *status quo*. And from the perspective of the opponent of the self-financed candidate, Section 319 presents no countervailing burden in return for its benefits. Either her self-financing opponent limits his personal expenditures

in their race or she receives access to Section 319's extra-limit funds.

VI. BECAUSE SECTION 319 TREATS SIMILARLY SITUATED CANDIDATES DIFFERENTLY, IT VIOLATES THE FIFTH AMENDMENT'S EQUAL PROTECTION GUARANTEE.

Section 319 violates the equal protection component of the due process clause of the Fifth Amendment because it subjects opposing candidates in the same election to different fundraising and disclosure obligations. This Court has "frequently condemned such discrimination among different users of the same medium for expression." *Mosley*, 408 U.S. at 96; *see also Burson*, 504 U.S. at 197 n.3. "Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause." *Ladue*, 512 U.S. at 51 n.9; *Carey v. Brown*, 447 U.S. 455, 459-71 (1980) (ordinance that exempted labor picketing from picketing ban violated Clause). "As in all equal protection cases . . . the critical question is whether there is an appropriate government interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95.[20]

A. Section 319 Treats Political Opponents Differently.

The district court rejected the claim that Section 319 violated to the Fifth Amendment, holding that

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[20] The government's obligation to act neutrally among speakers is found not only in the concept of equal protection, but also in the First Amendment itself. *Mosley*, 408 U.S. at 96. Section 319's differential burden on First Amendment speech similarly violates the Fifth Amendment. *See supra* pp. 40-44.

the "reasonable premise of [Section 319] is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns" because a substantial self-financer is "subject to no limits, while his opponent has chosen to finance his campaign with contributions that are subject to statutory limits." J.S. App. 17a-18a.[21] The court cited *Buckley's* rejection of minority party claims that public funding subjected them to unequal treatment. *See id.* However, *Buckley* expressly rejected the concept, at the heart of Section 319, that equalizing resources for candidates provides a legitimate basis for public funding. 424 U.S. at 98. Instead, *Buckley* permitted differential treatment because the provision merely "substitute[d] public funding for what the parties would raise privately and additionally impose[d] an expenditure limit." 424 U.S. at 96 n.129. The district court incongruously utilizes *Buckley's* analysis to uphold a statute that, for purposes of equality, provides more funds to candidates without any corresponding diminution in funding from other sources.

A self-financed candidate and her opponents are fundamentally similar because they are all competing for the same House seat. "All persons similarly circumstanced shall be treated alike." *See Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quotation omitted). Section 319 is based on the premise that one candidate's personal expenditures distinguish her from her opponents. But, unlike in a public financing context, a self-financed candidate does not opt into a state-created financing regime, she simply exercises

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[21] The district court again relied on *Buckley's* public financing discussion. 424 U.S. at 97-98. As discussed *supra* pp. 53-56, public financing has no relevance to this matter.

her First Amendment right to fund her own political expression. Her exercise of political speech in her campaign should not operate to create any distinction from other candidates.

"Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *McConnell*, 540 U.S. at 188 (rejecting argument that restrictions on political parties were discriminatory). In this matter, however, Congress ignored the real-world similarities among candidates. As detailed *supra* pp. 22-24, Section 319 does not accurately compare all funds utilized by competing candidates; it accurately measures only personal expenditures. Section 319 ignores both the war chests that incumbents often accumulate and the election year contributions received in greater amounts by incumbents. Indeed, rather than considering "real-world differences," Section 319 contemplates an alternative reality without these sources of money. Section 319 applies to a self-financed candidate who spends $350,000, but ignores an opponent who spends one dollar less. Only the latter is eligible for benefits, and the formulae for determining extra-limit funds would apply as if he had spent no personal funds at all. The "differential burdens," *Mosley*, 408 U.S. at 95-96, imposed on self-financed candidates do not reflect the electoral reality.

To the extent that a self-financed candidate also solicits contributions, the statute requires her to do so at standard levels, rather than at the increased limits applicable to her opponents. Again, this differential treatment occurs simply because one candidate has exercised her fundamental right to expend

personal funds on her own behalf. Her party committee may not coordinate with her, nor may her individual donors exceed their limits. The effect of this discrimination is to limit self-financed candidates' First Amendment rights in a manner not faced by other candidates.

B. Section 319 Treats a Self-Financed Candidate Differently From Others Participants in the Political Process.

A self-financed candidate is also treated differently from both individuals or committees who wish to make independent expenditures opposing her candidacy and other individuals or entities participating in the political process. Her spending enables her opponents to add to their own political speech. Yet personal expenditures by the entities opposing a self-financed candidate, regardless of the source of those funds, provide no concomitant benefit to the self-financed candidate.

CONCLUSION

For the reasons stated above, this Court should find that, on its face, BRCA § 319's disclosure requirements for self-financed candidates and authorization of extra-legal funds for their opponents unconstitutionally infringes on self-financed candidates' First Amendment rights of political expression and violates their right to equal protection of the law under the Fifth Amendment. This case should be remanded for entrance of appropriate declaratory and injunctive relief.

Respectfully submitted,

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February 20, 2008

ADDENDUM

ADDENDUM

[LOGO]

FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA FAX AND CERTIFIED FIRST CLASS MAIL

Helen-Mary B. McGovern
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Aug. 16, 2006

RE: MUR 5726
Jack Davis for Congress and Robert R. Davis,
in his official capacity as treasurer

Dear Ms. McGovern:

After considering all the available evidence, the Office of the General Counsel is prepared to recommend that the Federal Election Commission (the "Commission") find probable cause to believe that your client, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C) and 441a-1(b)(1)(D), provisions of the Federal Election Campaign Act of 1971, as amended, and 11 CFR §§ 400.21(b) and 400.22(b). Enclosed for your review is a brief stating the position of the General Counsel on the legal and factual issues of this matter.

You may file a brief stating your position on the issues and replying to the brief of the General Counsel. Your brief should be submitted to the Secretary of the Commission (ten copies if possible) within fifteen days of receipt of this notice. Three copies of your brief should also be forwarded to the Office of the General Counsel, if possible. The General Counsel's brief and any brief you submit will be considered

by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within fifteen days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing at least five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not grant extensions greater than twenty days.

The Commission may or may not approve the General Counsel's probable cause recommendation. If the Commission finds probable cause to believe a violation has occurred, the Office of the General counsel will contact you and attempt for a period of not less than thirty days, hut not more than ninety days to settle this matter through conciliation.

Should you have any questions, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lawrence H. Norton
General Counsel

Enclosure
Brief

[LOGO]

FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA FACSIMILE AND FIRST CLASS MAIL

Helen-Mary B. McGovern
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Jan. 31, 2007

RE: MUR 5726
Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer Jack Davis

Dear Ms. McGovern:

On January 19, 2007, the Federal Election Commission found that there is probable cause to believe your clients, Jack Davis and Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(C) and 441a-1(b)(1)(D), provisions of the Federal Election Campaign Act of 1971, as amended, and that Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 11 C.F.R. §§ 400.21(b) and 400.22(b) in connection with the failure to timely report expenditures made by Mr. Davis during the 2004 general election campaign.

The Commission has a duty to attempt to correct such violations for a period of at least 30 days and no more than 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement after 30 days, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within ten days. I will then recommend that the Commission accept the agreement. Please make the check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely.

Lawrence H. Norton
General Counsel

/s/ Rhonda J. Vosdingh
By: Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Enclosure
Conciliation Agreement

BEFORE THE FEDERAL
ELECTION COMMISSION

In the Matter of MUR: 5726

Jack Davis for Congress and
Robert R. Davis, in his official
capacity as treasurer Jack Davis

CONCILIATION AGREEMENT

This matter was initiated by the Federal Election Commission ("Commission"), pursuant to information ascertained in the normal course of carrying out its supervisory responsibilities. The Commission found probable cause to believe that Jack Davis violated 2 U.S.C. § 441a-1(b)(1)(C) and 2 U.S.C. § 441a-1(b)(1)(D), and Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(C), 2 U.S.C. § 441a-1(b)(1)(D), 11 C.F.R. § 400.21(b), and 11 C.F.R. § 400.22(b).

NOW, THEREFORE, the Commission and Jack Davis, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over Jack Davis, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer (collectively, "the Respondents") and the subject matter of this proceeding.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Jack Davis for Congress is a political committee within the meaning of 2 U.S.C. § 431(4). It was the principal campaign committee for Jack Davis, a candidate for the Democratic Party's nomination for the louse of Representative from the 26th Congressional District in New York in 2004.

2. Robert R. Davis is the treasurer of Jack Davis for Congress.

3. If a candidate makes an aggregate amount of expenditures from personal funds in excess of $350,000, the candidate or authorized committee shall file a notification of the expenditure within 24 hours of exceeding the threshold (FEC Form 10). 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R. § 400.21(b). For each additional expenditure of $10,000 or more, the candidate is required to file additional notifications. 2 U.S.C. § 441a-1(b)(1)(D); 11 C.F.R. § 400.22.

4. These notifications must be filed with the Commission, each candidate in the same election, and the national party of each such candidate. 2 U.S.C. § 441a-1(b)(1)(F); 11 C.F.R. §§ 400.21(b) and 400.22(b).[1]

---

[1] A candidate's personal expenditures could entitle his opponents to a threefold increase in the contribution limit under 2 U.S.C. § 441a(a)(1)(A) and a waiver of the limits on coordinated party expenditures under 2 U.S.C. § 441a(d). *See* 2 U.S.C. § 441a-1(a)(1); 11 C.F.R. § 400.41. Candidates are entitled to higher limits when the "opposition personal funds amount" exceeds $350,000. The opposition personal funds amount is distinct from the threshold reporting amount of $350,000 because it takes into account the personal funds expenditures of the other candidates and, depending on the date of calculation, may also take into account the gross receipts of both candidates. 2 U.S.C. § 441a-1(a)(2); 11 C.F.R. § 400.10. A candidate with a significant "gross receipts advantage" is less likely to qualify for the higher limits. *See* 2 U.S.C. § 441a-1(a)(2)(B)(ii); 11 C.F.R.

Although FEC Form 10 is signed by the committee treasurer, the candidate is responsible for ensuring that it is filed in a timely manner. *See* 11 C.F.R. § 400.25.

5. Each Form 10 filed with the Commission must include, among other things, "the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification." 2 U.S.C. § 441a-1(b)(1)(E)(iii).

6. Between March 18, 2004 and August 11, 2004, Mr. Davis expended $347,280 in personal funds on his campaign.

7. On September 2, 2004, Mr, Davis made an $80,000 loan to the Committee, increasing his total personal expenditures to $427,280. By expending over $350.000, the Committee and candidate were obligated to file with the Commission and with Mr. Davis's opponents an FEC Form 10, Notification of Expenditures from Personal Funds, within 24 hours of the threshold expenditure, or by September 3, 2004. *See* 2 U.S.C. § 441a-1(b)(1)(C). The Committee never filed this Form 10 with the Commission.

8. In addition, the Committee failed to file six additional FEC Form 10s regarding additional loans in excess of $10,000 made by Mr. Davis to the Committee on September 17, September 25, September 28, October 12, October 13, and October 22, 2004, in the amounts of $80,000, $100,000, $200,000, $150,000, $200,000, and $100,000, respectively.

---

§ 400.10. Similarly, a candidate seeking higher limits may be limited by the amount of personal funds that he or she expended. *See* 11 C.F.R. § 400.10.

V. Respondents committed the following violations:

1. Respondent Jack Davis violated 2 U.S.C. § 441a-1(b)(1)(C) by failing to file an initial notification disclosing that the candidate expended personal funds in excess of $350,000 and violated 2 U.S.C. § 441a-1(b)(1)(D) by failing to file six additional notifications following additional expenditures of personal funds in excess of $10,000.

2. Respondent Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(C) and 11 C.F.R. § 400.21(b) by failing to file an initial notification disclosing that the candidate expended personal funds in excess of $350,000 and violated 2 U.S.C. § 441a-1(b)(1)(D) and 11 C.F.R. § 400.22(b) by failing to file six additional Form 10s following additional expenditures of personal funds in excess of $10,000.

VI. Respondents will take the following actions:

1. Respondents will pay a civil penalty to the Federal Election Commission in the amount of two hundred fifty-one thousand dollars, ($251,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

2. Respondents will cease and desist from violating 2 U.S.C. § 441a-1(b)(1)(C), 2 U.S.C. § 441a-1(b)(1)(D), 11 C.F.R. § 400.21(b), and 11 C.F.R. § 400.22(b).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a

civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall he enforceable.

FOR THE COMMISSION:

Lawrence H. Norton
General Counsel

BY: _____ _____

Rhonda J. Vosdingh — Date
Associate General Counsel
for Enforcement

FOR THE RESPONDENTS:

_____ _____

Robert R. Davis — Date
Treasurer

BEFORE THE FEDERAL
ELECTION COMMISSION

In the Matter of MUR 5726

Jack Davis for Congress and
Robert R. Davis, in his official
capacity as treasurer Jack Davis

CONSENT TO EXTEND THE TIME TO
INSTITUTE A CIVIL LAW ENFORCEMENT SUIT

As consideration for the Federal Election Commission's agreement to hold MUR 5726 in abeyance until the constitutional challenge to the Millionaire Amendment to the Federal Election Campaign Act of 1971, as amended, filed by Jack Davis has been fully litigated, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, and Jack Davis hereby consent to toll the statute of limitations for any civil enforcement action that the Federal Election Commission might institute against it in connection with MUR 5726 pursuant to 2 U.S.C. § 437g(a)(6) for the period beginning on August 9, 2007 and extending through the date of final disposition on the constitutional claim.

This action will extend the time to institute a civil law enforcement suit for a commensurate period of time from the expiration date of the five-year statute of limitations found at 28 U.S.C. § 2462, or any other statute of limitations or repose that may be applicable in this matter.

/s/ Andrew Herman 8/27/07
Counsel for Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, and Jack Davis Date

APPELLEE'S BRIEF

9

3-19-08

No. 07-320

In the Supreme Court of the United States

JACK DAVIS, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

THOMASENIA P. DUNCAN
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DAVID KOLKER
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KEVIN DEELEY
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QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 109, applies to elections for the United States House of Representatives in which a candidate spends more than $350,000 in personal funds. In such an election, when certain conditions are met, Section 319 modifies the contribution and coordinated-expenditure limits that would otherwise apply to the self-financing candidate's opponent, and it imposes certain disclosure requirements on all candidates. The questions presented are as follows:

1. Whether this case is moot.

2. Whether appellant has standing to challenge the modified contribution and coordinated-expenditure limits established by Section 319.

3. Whether those modified limits on their face violate the First Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment.

4. Whether the disclosure requirements established by Section 319 are unconstitutional on their face.

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In the Supreme Court of the United States

No. 07-320

JACK DAVIS, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court (J.S. App. 1a-18a) is reported at 501 F. Supp. 2d 22.

JURISDICTION

The decision of the district court was issued on August 9, 2007. A notice of appeal was filed on August 16, 2007, and the jurisdictional statement was filed on September 7, 2007. On January 11, 2008, this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114; and 28 U.S.C. 1253.

STATEMENT

This case involves a facial constitutional challenge to Section 319 of BCRA (Section 319), 116 Stat. 109 (2 U.S.C. 441a-1 (Supp. V 2005)), part of the so-called "Millionaires' Amendment." Section 319 applies to elections for the United States House of Representatives in which a candidate contributes more than $350,000 in personal funds to his own campaign. If and when certain conditions are met, the opponents of such candidates may accept contributions from individuals in excess of the generally applicable limits. See 2 U.S.C. 441a-1(a)(1)(A)-(B) (Supp. V 2005). Under those circumstances, the usual statutory limits on political party expenditures that are coordinated with a candidate do not apply to expenditures in support of an opponent of the self-financing candidate. See 2 U.S.C. 441a-1(a)(1)(C) (Supp. V 2005). Appellant filed suit in federal district court, arguing that Section 319 on its face violates the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The three-judge district court rejected appellant's constitutional claims and granted the government's motion for summary judgment. J.S. App. 1a-18a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. V 2005); and to issue written advisory opinions concerning the appli-

cation of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Federal law has long prohibited any person from making contributions "to any candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed" a statutory cap, which is currently set at $2300. 2 U.S.C. 441a(a)(1)(A) (Supp. V 2005); 2 U.S.C. 441a(c) (2000 & Supp. V 2005); see J.S. App. 3a n.4. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the $1000 contribution limit then imposed by FECA. See *id.* at 23-35. The Court explained that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26. In response to the contention that the contribution limit had been set at too low a level, the Court in *Buckley* stated that "[i]f [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30 (citation and internal quotation marks omitted). Because expenditures made in coordination with candidates have essentially the same value to candidates as contributions, federal law has also long treated "coordinated expenditures"—including expenditures by political parties made in coordination with their own candidates, *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001)—as "contributions" subject to statutory limits, see *Buckley*, 424 U.S. at 46-47 & n.53.

While upholding statutory limits on contributions *to* federal candidates, the Court in *Buckley* invalidated FECA caps on the amount of personal wealth a federal candidate could spend on his own campaign. 424 U.S. at 51-54. Those expenditure provisions barred presidential and vice-presidential candidates from spending more than $50,000 of their personal wealth on their campaigns, limited Senate candidates to $35,000, and limited most House candidates to $25,000. *Id.* at 51. The Court concluded that "the First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

The Court in *Buckley* upheld Congress's decision to provide public financing for presidential campaigns and to make the availability of public money contingent on a candidate's agreement to adhere to statutory expenditure limitations. 424 U.S. at 57 n.65, 92-93. Unlike mandatory expenditure caps, the Court concluded, such an arrangement does not "abridge, restrict, or censor speech," but instead "facilitate[s] and enlarge[s] public discussion and participation in the electoral process." *Id.* at 92-93. The Court explained that, "[j]ust as a candidate may voluntarily limit the size of contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n.65.

3. Since 1910, federal law has required disclosure of various categories of information related to election campaigns. See *Buckley*, 424 U.S. at 61. Under current law, candidate campaign committees (among others) must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements to or from a person in excess of $200 in a calendar year (and in some instances, of any amount),

as well as total operating expenses and cash on hand. See 2 U.S.C. 433; 2 U.S.C. 434 (2000 & Supp. V 2005). The receipts that are required to be reported include both contributions and loans from the candidate. 11 C.F.R. 104.3(a)(3)(ii) and (vii)(B). FECA generally requires congressional candidate committees to file quarterly reports, a pre-election report no later than the 12th day before an election, and a post-election report within 30 days after an election. 2 U.S.C. 434(a)(2) (2000 & Supp. V 2005). In addition, candidate committees must file special notices regarding contributions of $1000 or more received less than 20 days but more than 48 hours before an election. 2 U.S.C. 434(a)(6)(A).

The Court in *Buckley* generally upheld FECA's reporting requirements at the then-applicable lower thresholds. See 424 U.S. at 60-84. The Court held that the required disclosures served the important government interests of (1) providing the electorate with information on campaign financing "in order to aid the voters in evaluating those who seek federal office," (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and (3) "gathering the data necessary to detect violations of the contribution limitations" that were simultaneously enacted. *Id.* at 66-68. The Court explained that FECA's disclosure requirements would unconstitutionally infringe associational rights only in the limited circumstance when compelled disclosure would cause a "reasonable probability" of "threats, harassment, and reprisals" against an organization or its members. *Id.* at 66, 74. In 1980, Congress amended FECA to raise the reporting thresholds to their current levels. See Federal Election Campaign

Act Amendments of 1979, Pub. L. No. 96-187, § 104, 93 Stat. 1348 (2 U.S.C. 434 (1982)).

4. The Court in *Buckley* recognized that, "[g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court acknowledged, however, that this relationship "may not apply where the candidate devotes a large amount of his personal resources to his campaign." *Id.* at 56 n.63. Based on its assessment of federal elections in the thirty years since *Buckley*, Congress determined that increasing numbers of congressional candidates now choose to rely largely on their own personal wealth to finance their campaigns.

In the debates that culminated in BCRA's enactment, Members of Congress identified various harmful consequences that could follow from the increasing impact of candidates' personal wealth on elections for federal office. The disparity in campaign resources created by wealthy candidates' expenditures of personal funds was thought to "ma[k]e it more difficult for non-wealthy opponents to compete and to put their messages and their ideas across to the public." 147 Cong. Rec. 3967 (2001) (statement of Sen. DeWine); see 148 Cong. Rec. 1382 (2002) (statement of Rep. Davis) (explaining that Section 319 "evens the playing field" between a non-wealthy candidate and one "who can go to McDonald's, have breakfast with himself, write himself a $3 million check and have the largest fund-raising breakfast in history"). The competitive advantage of self-financing candidates in turn threatened to create the public perception that "someone today who is wealthy enough can buy a seat" in Congress. 147 Cong. Rec. at 3976 (statement

of Sen. DeWine). Members of Congress also expressed concern that party officials increasingly consider individuals' wealth in recruiting potential candidates. See, *e.g.*, *id.* at 3969 (statement of Sen. McCain) ("[B]oth parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate.").

To address those phenomena, Congress enacted Section 319 of BCRA, which applies to elections for the United States House of Representatives.[1] Section 319 applies only to House election campaigns in which at least one candidate spends more than $350,000 in personal funds. For purposes of determining whether the $350,000 threshold has been crossed, the term "expenditure from personal funds" includes "an expenditure made by a candidate using personal funds," 2 U.S.C. 441a-1(b)(1)(A)(i) (Supp. V 2005), as well as "a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee," 2 U.S.C. 441a-1(b)(1)(A)(ii) (Supp. V 2005).

If a candidate for the House of Representatives makes expenditures from personal funds that exceed $350,000,

> his opponent may be permitted (1) to receive contributions at three times the limit for each donor that

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[1] Section 304 of BCRA, 116 Stat. 97 (2 U.S.C. 441a(i) (Supp. V 2005)), contains comparable provisions and applies to elections for the United States Senate. Section 304 is not at issue in this case. See J.S. App. 1a n.1; Appellant Br. 3 n.3. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), certain plaintiffs challenged the constitutionality of Sections 304 and 319 on their face, but the Court held that the plaintiffs lacked standing to sue and accordingly did not reach the merits of their challenge. See *id.* at 229-230.

> would otherwise be in place; (2) to receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations; and (3) to coordinate with their political party on additional party expenditures that would otherwise be limited.

J.S. App. 3a-4a (footnotes and citations omitted); see 2 U.S.C. 441a-1(a)(1)(A)-(C) (Supp. V 2005). To determine whether and to what extent he may accept contributions and coordinated expenditures that would otherwise exceed the statutory limits, an opposing candidate must calculate the "opposition personal funds amount" (OPFA). See 2 U.S.C. 441a-1(a)(2) (Supp. V 2005); J.S. App. 4a.[2] Section 319 limits the amount of increased contributions and increased coordinated party expenditures a candidate may receive to the amount of the total

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[2] The formula used to calculate the OPFA during the election year counts the expenditures from personal funds made by each candidate, adds 50% of the aggregate receipts raised by each candidate during the year prior to the election, and compares the totals. 2 U.S.C. 441a-1(a)(2) (Supp. V 2005). Only if the opponent has raised and spent $350,000 less of those funds than the self-financing candidate will he qualify to solicit additional financial support under the provision. The provision applies equally to all candidates, so that even a self-financing candidate can qualify to raise extra funds if he is running against a self-financing opponent who has raised and spent even more under the OPFA formula. The portion of the formula that takes into account a candidate's aggregate receipts during the non-election year—titled the "gross receipts advantage" provision—was added so that incumbents who raise a substantial amount of contributions in the year before an election year will not unduly benefit. See 147 Cong. Rec. at 5148 (statement of Sen. Durbin) (explaining that Congress's goal was to "get as close [as] possible to a level playing field but not create incumbent advantage").

OPFA disparity between the candidates. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005).

Section 319 also establishes reporting requirements for self-financing candidates and their opponents. See J.S. App. 5a. Within 15 days after becoming a candidate, an individual must disclose the amount of personal funds in excess of $350,000 that he intends to spend during the campaign. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005). If a candidate actually spends more than $350,000 in personal funds on his campaign, he must file an "initial notification" of that expenditure within 24 hours after exceeding the threshold. 2 U.S.C. 441a-1(b)(1)(C) (Supp. V 2005). Thereafter, for each aggregate expenditure of $10,000 or more in personal funds, the candidate must file a notification within 24 hours. 2 U.S.C. 441a-1(b)(1)(D) (Supp. V 2005). Those notifications must be filed with the Commission and provided to each opponent in the same election, and to the national party of each opponent. 2 U.S.C. 441a-1(b)(1)(F) (Supp. V 2005).

The opponent of a self-financing candidate is also subject to additional real-time reporting requirements. See 11 C.F.R. 400.30-400.31. After receiving the self-financing candidate's initial or additional notifications of expenditures from personal funds, the opposing candidate must calculate the current OPFA and, if and when he becomes eligible to invoke the modified contribution and coordinated-expenditure limits, must notify the Commission and his political party within 24 hours. 11 C.F.R. 400.30(b). If the opposing candidate reaches the maximum allowable amount and is no longer entitled to solicit increased contributions and coordinated party expenditures, he must notify the Commission and his political party within 24 hours. 11 C.F.R. 400.31.

5. Appellant Jack Davis was a candidate for United States Representative in New York's 26th Congressional District in both 2004 and 2006. J.S. App. 1a, 5a. In April 2006, appellant filed with the Commission a Statement of Candidacy for that congressional seat. See J.A. 102-103. Pursuant to Section 319, the Statement of Candidacy included a declaration of intent on which appellant was required to state the amount of personal funds in excess of the $350,000 threshold that he intended to spend in support of his primary and general election campaigns. J.A. 103. Appellant entered "$0.00" for the primary election and "$1,000,000" for the general election. *Ibid.*[3]

In June 2006, appellant filed suit in federal district court, asserting a facial challenge to Section 319. J.S. App. 5a. Pursuant to Section 403(a)(1) of BCRA, 116 Stat. 114, a three-judge district court was convened. See J.S. App. 1a, 6a. The district court granted the FEC's motion for summary judgment. *Id.* at 1a-18a.

a. The district court held that appellant had standing to sue. J.S. App. 6a-7a. The court explained that Section 319 "imposes new and added disclosure requirements on self-financing candidates such as [appellant]." *Id.* at 6a. The court concluded that "[t]hese additional disclosure requirements impose an injury-in-fact on self-

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[3] Appellant ultimately loaned his campaign committee $2,257,280 in 2006, including $1,520,000 for the general election. See *Davis for Congress, Report of Receipts and Disbursements* (Mar. 10, 2007) <http://images.nictusa.com/cgi-bin/fecimg/?F27930238050> (reporting $2,257,280 in candidate loans in the 2006 election cycle); *Davis for Congress, 24-Hour Notice of Expenditure from Candidate's Personal Funds* (Nov. 6, 2006) <http://images.nictusa.com/cgi-bin/fecimg/?_26960663096+0> (reporting $1,520,000 in total expenditures from personal funds in the general election).

financed candidates that can be traced directly to [Section 319]." *Ibid.*

b. The district court noted that appellant had brought a facial challenge to Section 319, and that such a suit is "the most difficult challenge to mount successfully." J.S. App. 7a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The district court held that appellant's facial challenge "fails at the outset" because Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." *Id.* at 9a. Rather, the district court explained, Section 319 "preserve[s] core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace." *Ibid.* The court observed that Section 319 "is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns," and that such regimes have "been consistently upheld against First Amendment challenges." *Ibid.*; see *id.* at 9a-10a (citing cases).

The district court rejected appellant's contention that Section 319, by conferring a competitive advantage on opponents of self-financing candidates, will impermissibly deter candidates for the House of Representatives from financing their own campaigns. See J.S. App. 10a-13a. The court acknowledged that "there may be cases in which a regulatory scheme creates a competitive advantage so extreme that it works an unconstitutional burden on a candidate's First Amendment right to pursue elective office." *Id.* at 11a. The court observed, however, that "no court has found such an unconstitutional burden where the disadvantage is the result of the

candidate's choice to fund his campaign from one of several permissible funding sources." *Ibid.* The court noted in that regard that this Court in *Buckley* had "upheld expenditure limitations for candidates who chose to participate in public financing of their campaigns." *Ibid.* (citing *Buckley*, 424 U.S. at 57 n.65); see p. 4, *supra*. The court further explained that appellant himself had not been deterred by Section 319, since he had chosen to self-finance his campaigns in both 2004 and 2006. See J.S. App. 13a.

c. The district court also rejected appellant's challenge to the disclosure requirements imposed by Section 319. J.S. App. 14a-17a. The court noted that this Court had upheld similar reporting obligations both in *Buckley* and in *McConnell* v. *FEC*, 540 U.S. 93, 194-195 (2003). J.S. App. 14a-15a. The court explained that, "[b]ecause [appellant] concedes that all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not [Section 319] ever applies," appellant's claim of an unconstitutional burden "is essentially a complaint about the timing elements of the reporting requirements." *Id.* at 16a. The court found that complaint to be unfounded, noting that "the timing deadlines of [Section 319] are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." *Ibid.* The court further observed that Section 319 imposes reporting obligations not only on self-financing candidates, but also on their opponents and on political parties. *Id.* at 16a-17a.

d. The district court rejected appellant's equal protection claim as well. J.S. App. 17a-18a. The court explained that "[t]he touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats similarly situated entities differently."

Id. at 17a. The court held that appellant "cannot make this showing because the reasonable premise of [Section 319] is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." *Ibid.*

6. While this case was pending before the three-judge district court, appellant lost the 2006 general election. His opponent, Congressman Thomas Reynolds, did not receive any increased contributions or coordinated party expenditures pursuant to Section 319. See *Reynolds for Congress Disclosure Reports* (visited Mar. 18, 2008) <http://images.nictusa.com/cgi-bin/fecimg/?C00336065> (reporting no increased contributions to Congressman Reynolds or coordinated party expenditures on his behalf pursuant to Section 319 in the 2006 election cycle).

7. On April 19, 2006, approximately two months before appellant filed this suit, the FEC notified appellant that the Commission had found reason to believe that appellant had violated Section 319's disclosure requirements during his 2004 House campaign. See App., *infra*, 1a-3a. On January 19, 2007, while this case was pending in the district court, the FEC found probable cause to believe that such violations had occurred. See Appellant Br. App. 3a. The Commission proposed a conciliation agreement under which appellant would acknowledge the violations and would pay a civil penalty of $251,000. See *id.* at 8a. Shortly after the district court issued its decision in this case, appellant consented to toll the limitations period for any enforcement action the FEC might file concerning the alleged 2004 violations, in return for the Commission's agreement to hold the matter

in abeyance pending final resolution of this suit. See *id.* at 10a.[4]

SUMMARY OF ARGUMENT

Section 319 represents a modest and constitutionally appropriate attempt to counteract the perception that a candidate who is wealthy enough can buy a seat in Congress. Section 319 serves to decrease the influence of personal wealth in congressional elections without in any way limiting the amount of personal funds that a candidate may spend in seeking office. Appellant has provided no basis for invalidating that law on its face. And his challenge fails for the even more basic reason that this Court lacks jurisdiction to entertain it.

I. This case is moot. Although appellant suffered judicially cognizable injury during the 2006 campaign as a result of Section 319's disclosure requirements, that injury ceased to be redressable once the election occurred. Such a challenge would likely fall within the "capable of repetition, yet evading review" exception to mootness principles if the plaintiff were to express his intent to run for the House of Representatives again. But the appellant here notably has not stated such an intent. Instead, appellant contends that the potential for an FEC enforcement action concerning the 2004 campaign gives him a continuing stake in the resolution of the disputed constitutional issues.

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[4] The record before the district court contained no information regarding the FEC's investigation of appellant for apparent violations of Section 319 during the 2004 campaign. Until appellant waived his right to confidentiality by revealing the existence and status of the investigation in his opening brief to this Court, the Commission was barred from publicly revealing the matter. See 2 U.S.C. 437g(a)(12); *In re Sealed Case*, 237 F.3d 657, 665-667 (D.C. Cir. 2001); App., *infra*, 3a.

That contention is flawed. Because appellant can raise his constitutional arguments as defenses to any enforcement action that the FEC may file, the pertinent issues will not "evad[e] review." Either the FEC will not pursue an enforcement action, in which case (given appellant's failure to profess an intent to run for office again) his challenge based on past elections will be moot; or the FEC will undertake such an action, in which case he can raise his constitutional objections in that context (so that those objections will not evade review).

In other words, the only proceeding appellant identifies as giving him a continuing stake in the relevant constitutional issues has a built-in opportunity for review of the statute's constitutionality as applied to appellant. That built-in opportunity means the dispute will not evade review, and any enforcement action the FEC may file will certainly provide a sufficient forum to test appellant's constitutional claims. As-applied enforcement actions are, after all, "the basic building blocks of constitutional adjudication." *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). Accordingly, appellant cannot establish that he falls within an exception to mootness principles, and his suit should be dismissed for lack of jurisdiction.

II. A. Appellant's challenge to Section 319's increased *contribution* limits (as opposed to Section 319's disclosure requirements) suffers from an additional jurisdictional defect—lack of standing. Because appellant's opponent did not invoke those increased limits during the 2006 campaign, appellant suffered no injury from those increased limits. Even if appellant could demonstrate that the parties' dispute is "capable of rep-

etition, yet evading review," there would be no basis for concluding that appellant will suffer in some future election an injury that he did *not* suffer in 2006. And because there is no prospect that appellant will be charged with having previously violated the expanded contribution limits (which applied to the *opponent's* fundraising rather than to appellant's own campaign), the possibility of an FEC enforcement action concerning appellant's own alleged violations of Section 319's *disclosure* provisions does not give appellant any continuing stake in the question whether the increased contribution limits are constitutional.

B. Section 319's increased contribution limits are consistent with the First Amendment. Those limits in no way burden political speech because they place no restrictions whatever on a candidate's ability to spend personal funds in support of his own campaign. If (as this Court held in *Buckley*) Congress may condition a presidential candidate's *own* access to federal funds on his agreement to abide by statutory spending caps, then relaxation of the contribution limits that apply to a self-financing candidate's *opponent* does not unconstitutionally penalize the decision to self-finance. Although the Constitution limits the means that Congress may employ to equalize electoral opportunities for wealthy and non-wealthy candidates, nothing in this Court's decisions supports appellant's contention that reducing wealth-based disparities in opportunity is an invalid governmental objective. In Section 319, Congress has sought to pursue that objective in a manner that furthers First Amendment values by increasing the volume of campaign-related speech without placing any restrictions whatever on the use of a candidate's personal wealth in running for office.

Contrary to appellant's contention, Section 319 does not reflect an abandonment of the anti-corruption purpose that contribution limits are generally intended to serve. Rather, they reflect Congress's effort to balance competing objectives in elections where a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support. And, of course, the perceptions that House and Senate seats may be bought and are the exclusive province of the rich are corrosive perceptions that Congress can seek to address. Nor is there any basis for appellant's repeated assertions that Sections 319 unconstitutionally favors incumbents over challengers. Section 319 by its terms draws no distinction between the two classes of candidates; appellant identifies no logical reason to suppose that challengers are more likely than incumbents to spend personal funds in excess of the $350,000 threshold; the available empirical evidence does not suggest that incumbents have benefitted disproportionately from Section 319's increased contribution limits; and any such speculation provides no basis for facial invalidation of an Act of Congress.

C. Appellant's equal protection challenge to Section 319's increased contribution limits also lacks merit. This Court has previously held that Congress may distinguish among candidates for public financing purposes and may deny public funds to candidates who refuse to abide by statutory spending caps. Congress therefore acted permissibly in concluding that, for purposes of the statutory contribution limits, appellant's large expenditures of personal funds rendered him differently situated from his opponent.

III. Section 319's disclosure requirements are also constitutional on their face. Although the declaration of

intent required by Section 319 has no direct analog in pre-BCRA law, its preparation is in no way burdensome, and the declaration does not unconstitutionally interfere with a candidate's campaign strategy. Indeed, appellant himself touted his personal wealth and ability to self-finance his campaign when he announced his candidacy. The other information that Section 319 requires to be reported would have been subject to mandatory disclosure under pre-BCRA law, and appellant identifies no basis for concluding that the somewhat different timing requirements imposed by Section 319 create a constitutional violation. And because a self-financing candidate's opponent is subject to significant additional disclosure requirements as well, Section 319 does not single out the self-financing candidate for unique burdens. In *Buckley* and *McConnell*, this Court upheld analogous disclosure requirements, and there is no basis for a different result here.

ARGUMENT

I. THIS CASE IS MOOT

A. Appellant's complaint in this case was filed on June 28, 2006, and alleged that appellant had declared his candidacy for the 2006 House election approximately three months earlier. See J.A. 7, 19. The complaint further alleged that appellant had been the Democratic candidate for the same House seat in 2004. J.A. 7. The complaint also alleged that, if appellant became the Democratic nominee, he intended to spend more than $350,000 of his own funds in the general election campaign, thereby triggering the application of Section 319. See J.A. 7, 21.

The district court issued its opinion in this case on August 9, 2007. See J.S. App. 18a. The court noted that

appellant had run for Congress in both 2004 and 2006. *Id.* at 5a. The court held that appellant had standing to sue because Section 319's disclosure requirements "impose an injury-in-fact on self-financed candidates that can be traced directly to [Section 319] and that would be removed by a favorable decision from this court." *Id.* at 6a. The court did not explain, however, why appellant's suit remained justiciable even after the 2006 election had concluded.

B. "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Ibid.*

This Court has recognized an exception to mootness principles for situations that are "capable of repetition, yet evading review." See, *e.g.*, *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2662 (2007) (*WRTL*); *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), "where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Spen-*

cer v. *Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks omitted) (quoting *Lewis*, 494 U.S. at 481). For an alleged wrong to be considered "capable of repetition," there must be a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 127 S. Ct. at 2663 (internal quotation marks omitted) (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam)); accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978).

C. Typically mootness problems are alleviated in the election context when the plaintiff alleges that he plans to participate in future campaigns and therefore will be subject to the same challenged laws. See *WRTL*, 127 S. Ct. at 2663 (holding that the plaintiff's challenge to BCRA's restrictions on the financing of certain broadcast advertisements was "capable of repetition" because the plaintiff had "credibly claimed that it planned on running materially similar" advertisements during future election years) (internal quotation marks and citation omitted). Appellant, however, has conspicuously failed to assert in this Court that he intends to self-finance another campaign that would trigger Section 319. Rather, appellant rests his claim (Br. 20-21) of a continuing controversy on two principal grounds: (1) the FEC's pending enforcement action stemming from the 2004 election (see pp. 13-14, *supra*) gives him a continuing "'personal stake' in the constitutionality of Section 319," and (2) the limited pre-election time period is insufficient for definitive resolution of the questions presented here.[5] Those arguments lack merit. In the ab-

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[5] Appellant also states (Br. 18) that, "[i]n the 2006 campaign, [appellant] suffered additional injury arising from his compliance with the

sence of any basis for concluding that appellant himself is likely to self-finance a future House campaign, this case is moot and therefore non-justiciable.

1. The FEC's finding of probable cause to believe that appellant violated Section 319 during the 2004 campaign (see Appellant Br. App. 3a-4a), with the consequent prospect that the Commission will pursue an enforcement action pursuant to 2 U.S.C. 437g(a)(6) (2000 & Supp. V 2005) if appellant declines to enter into the proposed conciliation agreement (see Appellant Br. App. 5a-9a), provides no sound basis for this Court to decide the instant appeal on the merits. For purposes of the "capable of repetition, yet evading review" exception to mootness principles, it is doubtful that potential future litigation concerning primary conduct that occurred *be-*

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statute's disclosure requirements." As the government noted in its motion to dismiss or affirm (at 24), we agree with the district court's holding (see J.S. App. 6a-7a) that appellant suffered injury-in-fact as a result of Section 319's disclosure requirements. Proof of *past* injury, however, cannot prevent appellant's suit for declaratory and injunctive relief (see J.A. 18) from becoming moot. See *Lewis*, 494 U.S. at 477 ("To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed."); cf. *Lyons*, 461 U.S. at 105-109. The government's motion to dismiss or affirm also stated (at 24-25 n.8) that "appellant's prior history of participation as a candidate in elections for the House of Representatives presumably provides a sufficient basis for concluding that the current dispute between the parties over the constitutionality of Section 319's disclosure provisions is likely to recur," but that statement was based on the assumption that appellant planned to run again. Because appellant's opening brief contains no expression of an intent to undertake a future self-financed campaign, the possibility of such a future campaign (without more) is insufficient to provide a basis for treating this appeal as justiciable. If appellant makes his intent to run a future self-financed House campaign clear in his reply brief or elsewhere, it will effectively moot this mootness discussion.

fore this suit was filed would constitute a "repetition" of the current dispute. But in any event, it is altogether clear that appellant's constitutional claims will not "evad[e] review" in any enforcement action. If the FEC does file suit alleging that appellant violated Section 319 during the 2004 campaign, appellant can raise his constitutional arguments as defenses in the enforcement proceeding. Compare *Lyons*, 461 U.S. at 109 (explaining that dismissal of the plaintiff's suit for injunctive relief would not cause the underlying constitutional challenge to "'evade' review" because that challenge "remain[ed] to be litigated in [the plaintiff's] suit for damages"). In such an enforcement action, moreover, the "limited period between elections" (Appellant Br. 20) would pose no potential obstacle to judicial resolution of the pertinent constitutional questions.

In short, the prospect of such an enforcement action cannot provide a sufficient stake to bring this case within the "capable of repetition, yet evading review" exception to mootness principles because the enforcement action has a built-in mechanism to ensure that review is provided, not evaded. And such as-applied challenges are the preferred method of constitutional adjudication. See *Carhart*, 127 S. Ct. at 1639.

2. In arguing that the FEC's probable-cause determination gives him a continuing stake in the question whether Section 319 is constitutional, appellant seeks in essence to use the judicial-review provisions of BCRA § 403(a), 116 Stat. 113, as a mechanism for pretermitting a possible Commission enforcement action. BCRA's provisions for expedited review allowed this Court to resolve a variety of constitutional challenges to the statute well in advance of the 2004 election. See *McConnell*, *supra*. On a going-forward basis, those provisions will

enable future participants in the federal electoral process to determine whether conduct in which they propose to engage is constitutionally protected. But when, as here, a plaintiff does not assert an intent to engage in future activities regulated by BCRA, there is no reason and no need to use BCRA's extraordinary judicial-review procedures—and this Court's scarce resources—as an alternative means of resolving the legality of *prior* conduct with respect to a candidate who has not stated an intent to run again.

Appellant's effort to derail the FEC's possible enforcement action is also in tension with established principles governing judicial review of Executive Branch action. In *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), this Court held that the issuance by the Federal Trade Commission (FTC) of an administrative complaint alleging reason to believe that a private party (Socal) had violated the law was not "final agency action" subject to review under the Administrative Procedure Act, 5 U.S.C. 704. See *Standard Oil Co.*, 449 U.S. at 239-246. The Court explained that the FTC's issuance of the complaint had no "legal or practical effect, except to impose upon Socal the burden of responding to the charges made against it." *Id.* at 242. The Court further observed that "every respondent to a[n] [FTC] complaint could make the same claim that Socal had made," and that "[j]udicial review of the averments in the [FTC's] complaints should not be a means of turning prosecutor into defendant before adjudication concludes." *Id.* at 242-243; cf. *Younger* v. *Harris*, 401 U.S. 37, 43-54 (1971) (holding that federal courts should ordinarily decline to entertain suits to enjoin pending state enforcement actions); *id.* at 54 (explaining that "the possible unconstitu-

tionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it").

It is also significant that, while the FEC has found probable cause to believe that appellant violated Section 319 during the 2004 campaign, appellant's brief does not concede that such a violation occurred. Thus, appellant seeks an immediate ruling as to the validity of his constitutional defenses to any enforcement action, while reserving the option of later contending (if this Court rejects his constitutional arguments) that he complied with Section 319 in 2004. That approach contravenes the bedrock principle that a federal court should not resolve constitutional questions unless and until its disposition of pertinent non-constitutional issues compels it to do so. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

If appellant had not been a candidate in the 2006 election, but had instead premised his claim of standing on the possibility of an FEC enforcement action concerning his conduct in 2004, the instant suit would have been subject to dismissal *ab initio* under the principles set forth above. Although the application of Section 319's disclosure requirements to appellant's 2006 campaign subjected him to judicially cognizable injury, the injunctive and declaratory relief that appellant seeks can do nothing to prevent or redress that harm now that the 2006 election has occurred. Because continued adjudication of appellant's constitutional challenge is not supported either by the injury that the district court identified, or by the potential harm on which appellant now relies, the appeal should be dismissed as moot.[6]

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[6] If appellant's suit for declaratory and injunctive relief were otherwise justiciable, as it was during the period while the 2006 campaign

II. APPELLANT LACKS STANDING TO CHALLENGE THE INCREASED CONTRIBUTION LIMITS ESTABLISHED BY SECTION 319, AND THOSE LIMITS ARE IN ANY EVENT CONSTITUTIONAL ON THEIR FACE

A. Appellant Cannot Establish Any Actual Or Imminent Injury Resulting From The Increased Contribution Limits

1. In order to satisfy the "irreducible constitutional minimum" of Article III standing, appellant must establish (1) an injury-in-fact that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1992)). Insofar as appellant challenges Section 319's modifications of the generally applicable limits on contributions and party coordinated expenditures, he cannot satisfy Article III's "injury in fact" requirement. Appellant has not shown that Section 319 caused him any "concrete and particularized" injury in the past, or that any such injury is imminent.

During the 2006 election campaign, appellant's opponent received no contributions, and the opponent's political party made no coordinated expenditures, in excess of the generally applicable FECA limits. See p. 13, *su-*

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was ongoing, the possibility of an FEC enforcement action based on alleged violations in 2004 would not preclude the suit from going forward. Cf. *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 187-192 (1981). But while the prospect of an enforcement action alleging prior violations does not *bar* appellant's suit, neither does it serve to keep alive claims for prospective declaratory or injunctive relief that are otherwise moot.

pra. The possibility that his opponent would invoke the modified limits established by Section 319 did not deter appellant from loaning his campaign approximately $2.25 million in 2006. See note 3, *supra*; J.S. App. 14a ("We struggle to see how [appellant] can credibly argue that his speech has been 'chilled' in light of the fact that he has chosen to pay for his campaign and has spent, after all, a considerable amount of his own money in excess of the $350,000 cap."). Although the 2006 election campaign had not ended at the time of the summary judgment briefing in the lower court, it is now clear that appellant, in fact, suffered no injury from Section 319's modification of some of the statutory limits on financial support for candidates.

Even if appellant could demonstrate that the "capable of repetition, yet evading review" exception to mootness principles applies to this case, appellant could not pursue his constitutional challenge to the aspects of Section 319 that caused him no injury during the 2006 campaign. A showing that the parties' dispute is "capable of repetition" would provide no basis for concluding that appellant will be injured by Section 319's increased contribution limits in future election cycles in light of the fact that appellant was *not* injured by those provisions in the most recent campaign. Appellant's First Amendment and equal protection challenges to Section 319's modified contribution and coordinated-expenditure limits would therefore be non-justiciable even if appellant could establish a live controversy concerning the aspects of Section 319 (*i.e.*, the disclosure requirements imposed by that provision) that previously subjected him to judicially cognizable injury.

2. Appellant contends (Br. 18) that "[t]he injuries imposed by Section 319's disclosure regime are suffi-

cient to confer standing on [appellant] to challenge the statute in its entirety." Standing, however, "is not dispensed in gross," and proof of injury from one aspect of a statutory scheme does not establish standing to challenge provisions that have not caused the plaintiff harm. *Lewis* v. *Casey*, 518 U.S. 343, 358-359 n.6 (1996); see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) ("[W]e have insisted * * * that a plaintiff must demonstrate standing separately for each form of relief sought.") (internal quotation marks and citation omitted); *Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982) (explaining that "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, though similar, to which he has not been subject"). Although the FEC has found probable cause to believe that appellant previously violated Section 319's *disclosure* requirements, appellant has not been accused—and, in the nature of things, could not plausibly be accused—of violating Section 319's increased contribution limits, which applied to his *opponent*. Thus, although appellant has standing to challenge Section 319's disclosure requirements (assuming the controversy is otherwise justiciable), he lacks standing to challenge the contribution and coordinated-expenditure provisions.

3. In a related vein, appellant contends (Br. 18-19) that he has standing to challenge Section 319's expanded contribution limits, notwithstanding his opponent's failure to invoke those limits in the 2006 campaign, because those limits cannot be severed from Section 319's disclosure requirements. That contention ignores BCRA's express severability provision, which states that, if any BCRA provision or any application of a BCRA provision

"is held to be unconstitutional, the remainder of this Act * * * and the application of the provisions * * * to any person or circumstance, shall not be affected by the holding." BCRA § 401, 116 Stat. 112. But, more fundamentally, appellant's severability argument gets things backwards. Even if appellant's severability analysis were correct, that would simply mean that a successful challenge to Section 319's disclosure requirements would have the ultimate practical effect of invalidating the enhanced contribution limits as well. It would not follow that appellant has standing to challenge the contribution limits.

Moreover, this Court has not viewed disclosure requirements and substantive financing limits as standing or falling together. Even if Section 319's enhanced contribution limits for the opponents of self-financing candidates were held to be invalid, the disclosure requirements applicable to the self-financing candidates themselves would serve a valid informational purpose and would remain in effect pursuant to BCRA's severability provision. The validity of the disclosure requirements thus is not dependent on the validity of the enhanced contribution limits.

B. Section 319's Enhanced Contribution Limits Are Consistent With The First Amendment

Section 319's modified limits on financial support for the opponents of self-financing candidates do not violate the First Amendment and certainly do not do so on their face.

1. Appellant repeatedly describes Section 319 as "regulat[ing]" (Br. 21, 34, 44, 46), "burden[ing]" (Br. 29, 40, 47), or "punish[ing]" (Br. 34) a self-financing candidate's campaign-related speech. As the district court

recognized, however, Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." J.S. App. 9a. In particular, Section 319's expanded contribution limits are by their terms directed at the *opponent's* fundraising and in no way alter the range of legally permissible options that are available to the self-financing candidate himself.

In short, as the district court explained, Section 319 "does not limit in any way the use of a candidate's personal wealth in his run for office." J.S. App. 9a. Thus, contrary to appellant's suggestion, Section 319 does not reflect a congressional effort to "restrict the speech of some elements of our society in order to enhance the relative voice of others." Br. 42 (quoting *Buckley*, 424 U.S. at 48-49). Rather, Congress sought to "enhance the relative voice" of non-wealthy candidates *without* "restrict[ing] the [self-financing candidate's] speech." And the First Amendment poses no bar to Congress's efforts to *increase* political speech. Section 319 does impose some consequences on a candidate's choice to self-finance beyond certain amounts. But this Court has already upheld the constitutionality of statutes imposing similar consequences on a candidate's spending choices.

2. The principal thrust of appellant's First Amendment argument (see, *e.g.*, Br. 40) is that (i) because appellant has a constitutional right to make unlimited expenditures in support of his own campaign, he cannot be penalized for exercising that right; and (ii) because an election can have only one winner, any benefit provided to his opponent should be regarded for constitutional purposes as a penalty imposed on appellant. That line of reasoning, however, is flatly contradicted by *Buckley*.

Appellant has not challenged the validity of *Buckley*, and that decision is therefore entitled to full *stare decisis* effect. See *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500-2501 (2006) (Alito, J., concurring in part and concurring in the judgment).

The Court held in *Buckley* that, although the First Amendment precludes Congress from placing binding limits on a candidate's independent campaign expenditures, Congress "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. Thus, *Buckley* establishes that a candidate's insistence on spending personal funds in amounts exceeding the statutory threshold may legitimately be treated by Congress as a ground for withholding a federal subsidy to which the candidate would otherwise be entitled. Moreover, the Court in *Buckley* recognized that a candidate's First Amendment right to make unlimited campaign expenditures is not violated simply because the candidate is subjected to some practical disadvantage as a result of exercising that right.[7]

This case follows *a fortiori* from *Buckley* because the disadvantage to which self-financing presidential candidates are subjected—*i.e.*, the denial of federal funds that would otherwise be paid to the candidate himself—is

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[7] Appellant characterizes Section 319 as content-based regulation of a self-financing candidate's speech. See Br. 35, 45. The application of Section 319, however, does not turn on the content of a candidate's speech, but on the amount of personal funds expended. This Court's decision in *Buckley* makes clear that Congress may create financial disincentives to independent campaign spending without violating the Constitution. Section 319 neither deprives the self-financing candidate of funds nor divests him of any other potential benefit; it simply loosens the fundraising restrictions placed upon his opponents.

much more direct and immediate than the competitive injury that appellant claims he would suffer if an opponent were enabled to raise greater amounts of money. If, as *Buckley* holds, Congress may treat a self-financing presidential candidate's spending decisions as a ground for declining to provide federal money to the candidate *himself*, there is no basis (especially in the context of a facial challenge such as this) for treating the modification of limits on an *opponent's* fundraising as a constitutional violation.

Appellant seeks to distinguish *Buckley* on the ground that, unlike a presidential candidate who receives public funds in exchange for his agreement to comply with statutory spending limits, appellant would have "receive[d] no countervailing benefits" if he had decided to forgo self-financing. Br. 55. *Buckley* makes clear, however, that appellant cannot establish a First Amendment violation simply by showing (Br. 41) that Section 319 differentiates between House candidates who spend $350,000 or more on their own campaigns and House candidates who do not. More fundamentally, however, appellant cannot have it both ways. If he claims constitutional injury from his opponent's increased funding options, he cannot turn around and deny that he derives a benefit from keeping the baseline limits in place.

The fundamental premise of appellant's First Amendment challenge is that, in a zero-sum game like a candidate election, any benefit to one candidate is for constitutional purposes a burden on the other. Appellant argues on that basis that he was penalized for constitutionally protected conduct when the fundraising restrictions on his opponent were loosened as a result of his own campaign spending. That analysis logically suggests, however, that appellant would derive a bene-

fit if the limits on contributions to his opponent were made more restrictive. By agreeing to spend less than $350,000, appellant could have prevented Section 319's expanded contribution limits from taking effect, thereby reducing the pool of funds to which his opponent would have access. It is therefore incorrect to say that the candidate who forgoes self-financing derives no countervailing benefit.

Appellant contends (Br. 55) that, "[i]n the context of the campaign finance system, imposition of the standard contribution limits on one's opponents—limits that are uniformly applied to all other candidates—confers no benefit; it simply preserves the *status quo*." But as the volume of stay requests this Court receives attests, in many cases a party may derive substantial benefits from simply preserving the status quo. Congress has no constitutional obligation, moreover, to limit private contributions to federal candidates at all. From a constitutional standpoint, application of the "standard contribution limits" to appellant's opponent is just as gratuitous as the federal subsidy involved in *Buckley*.[8] In determining whether appellant could have derived a benefit by agreeing to spend less of his own money on his campaign, the relevant question is not whether his opponent would then have been subject to contribution limits lower than those that applied to *other* House campaigns, but whether the limits would have been lower than those

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[8] Likewise, Congress could have structured the relevant BCRA provisions such that the default contribution limit was higher and would be reduced only if an opposing candidate certified that he would not self-finance beyond a certain limit. Under such a statute, spending restraint would obviously be rewarded with reductions in an opponent's contribution limits, but the substance of the statute would remain unchanged.

that otherwise would have applied in appellant's *own* race.[9]

3. As the district court recognized, Congress enacted Section 319 to reduce the natural advantage that wealthy individuals possess in campaigns for federal office. J.S. App. 2a-3a n.2; see pp. 6-7, *supra*. The Court in *Buckley* explained that, under the FECA contribution limits, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court viewed that correlation as a healthy byproduct of the contribution limits it upheld.

The Court in *Buckley* also noted, however, that in light of the Court's invalidation of expenditure limits, the "normal relationship" between a candidate's financial resources and the level of popular support for his candidacy "may not apply where the candidate devotes a large amount of his personal resources to his campaign." 424 U.S. at 56 n.63. In enacting Section 319, Congress sought partially to restore that "normal rela-

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[9] Appellant argues (Br. 46) that a self-financing candidate may sometimes "forgo substantial reliance on private contributions" in order to convey the message "that he will best represent the electorate because he is not beholden to individual, party, and committee donors." But a self-financing candidate who spends large amounts of personal wealth, while declining on principle to accept contributions above the generally applicable BCRA limits, is clearly better off under the BCRA regime taken as a whole than he would be if campaign fundraising were unregulated. Such a candidate suffers no harm from the application of the BCRA limits to his own campaign (since those limits simply bar him from accepting contributions that he would decline in any event), and (under appellant's zero-sum theory) even the expanded limits that apply to his opponent under Section 319 will place appellant in a better position than if no contribution limits existed.

tionship." Section 319 also serves to counteract the public perception that wealthy people can buy seats in Congress, which can certainly have a corrosive effect by contributing to cynicism in the electorate. In addition, Section 319 increases the incentives for less wealthy candidates to run for office, and it encourages political parties to recruit candidates based on merit, rather than personal financial wherewithal. See pp. 6-7, *supra*.

Although appellant repeatedly contends (*e.g.*, Br. 25, 28) that attempting to level electoral opportunities for candidates of different personal wealth is an illegitimate governmental objective, this Court's decisions do not support that assertion. To be sure, the Constitution limits the *means* that Congress may employ to achieve that goal. Thus, the Court in *Buckley* held that the "interest in equalizing the relative financial resources of candidates competing for elective office" was a constitutionally insufficient justification for restrictions on a candidate's own campaign spending. 424 U.S. at 54. That holding, however, was based not on doubt as to the legitimacy of the relevant government interest, but on the conclusion that "the First Amendment simply cannot tolerate [the spending cap's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Ibid.* Section 319, by contrast, reflects Congress's effort to achieve the same objective *without* limiting the self-financing candidate's freedom of expression, in a manner calculated to *increase* the volume of campaign-related speech. Indeed, not only are Congress's goals unproblematic, but the means it chose to pursue those objectives actually *relax*

contribution and coordinated-expenditure limits that themselves trigger First Amendment scrutiny.[10]

In a related vein, appellant contends (Br. 28, 31) that the Court's decisions identify the prevention of actual or apparent corruption as the *only* government interest that can support campaign-finance regulation. That argument is incorrect. It is true that, in sustaining statutory contribution limits against contentions that those limits infringed the First Amendment rights of either the potential recipient or the would-be donor, the Court has relied exclusively on that anti-corruption rationale. See, *e.g.*, *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 388-389 (2000) (*Shrink Mo.*); *Buckley*, 424 U.S. at 26-27.

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[10] Appellant cites three different passages in *Buckley* that, in appellant's view, hold that leveling electoral opportunities is an illegitimate governmental objective. See Br. 25 (citing *Buckley*, 424 U.S. at 48-49, 54); Br. 57 (citing 424 U.S. at 98). None of the cited passages supports that proposition. The first passage states that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. By its terms, that statement disapproves a particular *means* of achieving equalization ("restrict[ing] the speech of some elements of our society") but does not suggest that equalization is an invalid *objective*. Similarly in the second passage, the Court stated that the government's "interest in equalizing the relative financial resources of candidates competing for elective office * * * is clearly not sufficient to justify the * * * infringement of fundamental First Amendment rights" that a mandatory spending cap entails. *Id.* at 54. The Court's conclusion that the equalization interest is not "sufficient" to justify direct restrictions on a self-financing candidate's speech does not imply that the interest is illegitimate. The third passage simply states that Congress need not treat all major and minor parties identically in fashioning a public financing scheme. *Id.* at 98. The conclusion that a different form of equalization is not constitutionally *required* says nothing about the legitimacy of the government interest asserted here.

But even in that context, the Court has not identified the rooting out of quid pro quo corruption as the only relevant interest, but has also allowed regulation of corporate electoral spending to ensure that the extent of such spending correlates with actual public support for the recipient or beneficiary. See, *e.g.*, *FEC* v. *Beaumont*, 539 U.S. 146, 154, 162-163 (2003) (requirement that corporate contributions to federal candidates be made from a separate segregated fund ensures that such contributions reflect the will of the persons from whom the corporation has obtained the money); *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 659-660 (1990) (requirement that corporate express advocacy of electoral results be financed from a separate fund validly addresses "the corrosive and distorting effects of immense aggregations of wealth that * * * have little or no correlation to the public's support for the corporation's political ideas"). Any public perception that House seats are available only to the wealthy would raise analogous concerns.

Moreover, in upholding BCRA's disclosure requirements, the Court relied not only on the government's interest in "deterring actual corruption and avoiding any appearance thereof," but also on the separate interests in "providing the electorate with information" and "gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; see *id.* 321 (Kennedy, J., concurring in the judgment in part and dissenting in part) (finding BCRA's disclosure requirements generally constitutional based on the informational interest identified in the Court's opinion). The Court's decisions thus do not announce a per se rule that the prevention of actual or apparent corruption is the only government interest that can jus-

tify campaign-finance legislation. Rather, those decisions indicate that the range of interests that may support such legislation will vary depending on the nature of the particular law involved and the severity of its impact on a candidate's ability to conduct his campaign. Because Section 319's enhanced contribution limits impose *no* restrictions on a self-financing candidate's own electoral activities, they may be upheld based on government interests that would be insufficient to support more intrusive regulation.[11]

The core rationale for Section 319—*i.e.*, the public interest in diminishing the importance of personal wealth as a criterion for election to federal office (and the related interest in diminishing the perception that wealth

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[11] Appellant argues (Br. 44) that "Section 319 regulates a self-financed candidate's speech on his own behalf" and therefore "is subject to strict scrutiny." That is not correct. As stated, appellant's own spending remains unrestricted by Section 319. And to the extent Section 319 imposes consequences on anyone, it lessens the First Amendment burdens of opponents in certain circumstances. The burdens lifted or relaxed are themselves subject to "relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161. In reviewing contribution limits against potential recipients' claims that the limits had been set too *low*, this Court has held that such limits should be sustained unless they "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 126 S. Ct. at 2492 (quoting *Buckley*, 424 U.S. at 21); see *Shrink Mo.*, 528 U.S. at 397. There is no basis for applying any stricter standard of review to the increased contribution limits at issue in this case, which have no direct impact on the self-financing candidate's conduct of his *own* campaign, but simply expand the range of funds potentially available to his opponent. But, in reality, the more straightforward way to decide this case is to recognize that Section 319 allows a potential self-financing candidate to choose which of two alternative regimes will govern his opponent's fundraising. Neither regime nor the choice between them runs afoul of the First Amendment.

has become an essential prerequisite for federal elective office)—was not specifically identified in *Buckley* and is not identical to the interests that public financing of presidential campaigns is intended to serve. Appellant makes no meaningful effort, however, to explain why the reduction of wealth-based disparities in electoral opportunity *should* be regarded as an illegitimate government objective. Congress has permissibly sought to reduce such disparities in a variety of contexts. See, *e.g.*, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 536 (2001) (access to legal services); *Schweiker* v. *Hogan*, 457 U.S. 569, 571-572, 590 (1982) (access to medical services). Although the Constitution of course imposes important limits on the means by which Congress may address such disparities (*e.g.*, Congress may not take private property without compensation in order to transfer it to a less wealthy individual), appellant identifies no other sphere of endeavor in which the reduction of wealth-based disparities in opportunity has been treated as an illegitimate governmental goal. There is no reason why Congress is prohibited from seeking to level the playing field when it comes to the pursuit of federal elective office, particularly when, as here, it places no restrictions on a candidate's ability to use his own personal wealth in seeking office.

Appellant also argues (Br. 48-49, 50) that Section 319 fails to achieve its equalization objective because it ignores (or discounts the significance of) other sources of funding, such as incumbents' "war chests." Unlike a self-financing candidate's personal fortune, however, money raised (even in large aggregate amounts) through contributions subject to the BCRA limits "will normally vary with the size and intensity of the candidate's support." *Buckley*, 424 U.S. at 56. In enacting Section 319,

Congress could therefore legitimately regard financial disparities produced by one candidate's great personal wealth as more problematic than similar disparities created by another candidate's superior fundraising prowess. Cf. *Austin*, 494 U.S. at 659-660 (noting that corporate express advocacy is potentially problematic for non-*MCFL* corporations because corporate wealth bears no relationship to public support for a candidate). And, in all events, Congress specifically adopted a "gross receipts advantage" approach (see p. 8 & note 2, *supra*) to reduce any benefit to incumbents and other candidates who may be able to raise sizable amounts in the year prior to the election.[12]

4. Appellant contends (Br. 28-29) that, because Section 319 permits opponents of self-financing candidates to accept contributions in excess of the generally appli-

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[12] The "gross receipts advantage" is calculated based on funds acquired by each candidate as of December 31 of the year before the general election and counts 50% of gross receipts "that may be expended in connection with the election." 2 U.S.C. 441a-1(a)(2)(B)(ii) (Supp. V 2005). By taking account of the funds raised prior to the election year, Congress sought to ensure that incumbents do not unduly benefit from "war chests" they may have built up in advance.

Section 319 thus reflects a compromise between (a) treating funds raised from private donors subject to the BCRA contribution limits in precisely the same manner as a self-financing candidate's accumulated personal wealth, and (b) ignoring contributed funds altogether in calculating the self-financing candidate's monetary advantage. That choice was Congress's to make. In upholding the FECA provisions that govern public financing of presidential campaigns, the Court in *Buckley* explained that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. * * * Without any doubt a range of formulations would [adequately serve the relevant congressional purposes]. We cannot say that Congress' choice falls without the permissible range." 424 U.S. at 103-104; see pp. 39-43, *infra*. The same analysis applies here.

cable FECA limit, it is inconsistent with the anti-corruption rationale on which those limits have been sustained. That claim lacks merit.

In setting and later adjusting the FECA limit on individual contributions, Congress has sought to prevent the actual or apparent corruption that large contributions might engender, while ensuring that candidates can obtain the resources needed to run effective campaigns. As this Court has recognized, the task of identifying the specific dollar limit that strikes the most appropriate balance between those objectives is largely entrusted to Congress. See *Buckley*, 424 U.S. at 30 (explaining that, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000") (citation omitted); accord *Shrink Mo.*, 528 U.S. at 397.[13]

The modified contribution and coordinated-expenditure limits contained in Section 319 do not reflect congressional abandonment of FECA's anti-corruption purpose. Rather, they reflect Congress's determination that the balance should be adjusted in a subset of elections to address an additional legitimate interest that is distinctly raised in that subset. Congress's decision is analogous to a State's decision to set different contribution limits for different races based on a variety of factors such as the costs of different elections and the numbers of voters that need to be reached. This Court might have concluded that the highest contribution limit

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[13] Because Congress has substantial discretion to craft the details of a campaign-finance regime, Section 319 is not rendered unconstitutional simply because thresholds other than $350,000 could reasonably have been chosen (see Appellant Br. 50), or because the $350,000 threshold is not indexed for inflation (see *id.* at 23).

for any race must apply to every race, on the theory that the State had apparently concluded that the highest limit was consistent with preventing quid pro quo corruption. Instead, the Court upheld a variable-limit regime in *Shrink Missouri*, and struck down such a system in *Randall* because the applicable limits were too low in absolute terms, not just in relation to other state limits. There is no reason that Congress cannot make an analogous judgment that certain kinds of House races require higher contribution limits.

Specifically, Congress determined that, for elections in which a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support, the fundraising limits applicable to opposing candidates should be recalibrated to account for the fact that one candidate's spending is enhanced based on factors not tied to any indication of popular support. See 148 Cong. Rec. at 3603 (statement of Sen. McCain) ("Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election."). That is a permissible determination.[14]

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[14] Section 319 was carefully crafted to target the problems that Congress identified without unduly burdening or benefitting either self-financing candidates or their opponents. Section 319's disclosure requirements do not apply to all self-financing candidates, but only to those who spend more than $350,000 on their own campaigns. The opponent's contribution limits are relaxed only when the OPFA disparity between the two candidates exceeds $350,000. See note 2, *supra*. Section 319 caps the amount of increased contributions and

Nothing in this Court's decisions suggests that Congress is foreclosed from recalibrating the statutory limits for particular elections in which one candidate's large expenditures of personal wealth implicate a government interest distinct from those that inform the generally applicable caps. Cf. *Buckley*, 424 U.S. at 36 (explaining that FECA "provisions [excepting some volunteers' expenses from contribution limits] are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates"). Such accommodation of competing interests is the norm rather than the exception in legislation, and "[c]ourts * * * must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). As this Court has explained,

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent sim-

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coordinated party expenditures that an opponent may accept, and thus in most circumstances prevents an opponent from raising more in additional funds under the provision than the self-financing candidate's expenditures of personal funds on his own campaign. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005). In addition, the opponents of self-financing candidates remain subject to substantial statutory fundraising restrictions that help to reduce the possibility of corruption or the appearance thereof. Section 319 does not affect the contribution restrictions on corporations, labor unions, foreign nationals, or political committees, and it relaxes but does not eliminate the limits on contributions by individuals.

> plistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

5. Appellant's repeated assertions (Br. 22, 32, 34) that Section 319 favors incumbents over challengers is unsupported by the statutory text or by record evidence. Section 319 draws no express distinction between incumbents and challengers; its application turns solely on whether a particular candidate has made campaign-related expenditures of personal funds in an amount exceeding the statutory threshold. And the prospect of self-financing was not a mere hypothetical possibility; many incumbents had engaged in self-financing in the past and would likely do so in the future.

The record evidence concerning Section 319's actual implementation also does not support appellant's characterization of Section 319 as an incumbent-protective measure. During the first four years after Sections 304 and 319 were adopted, 110 House and Senate candidates became eligible to receive enhanced contributions under the modified limits, but only six were incumbents. See J.A. 86, 88. The other 104 "beneficiaries" were not incumbents. If Section 319 were designed as appellant suggests, it has proved remarkably ineffective. Especially in the context of a facial challenge such as this, appellant's speculation about the impact of Section 319 on incumbents versus challengers provides no basis for invalidating Section 319.

Appellant's reliance (Br. 33) on the plurality opinion in *Randall*, 126 S. Ct. at 2495-2496, is therefore misplaced. In *Randall*, the plurality's conclusion that the contested contribution limits would often impair a challenger's ability to mount an effective campaign was

based in part on extensive record evidence. See *ibid.* Because appellant has identified no comparable evidentiary basis for concluding that Section 319 is skewed in favor of incumbents, his challenge should be rejected. See *Buckley*, 424 U.S. at 31 ("Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.").

C. Appellant's Equal Protection Challenge To Section 319's Expanded Contribution Limits Lacks Merit

Appellant contends (Br. 56) that "Section 319 violates the equal protection component of the due process clause of the Fifth Amendment because it subjects opposing candidates in the same election to different fundraising * * * obligations." Appellant's claim to a constitutional entitlement to a perfectly level playing field is both ironic in light of the thrust of his other arguments and unavailing in any event. The district court correctly recognized that a showing of differential treatment cannot by itself establish a constitutional violation. Rather, "[t]he touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats *similarly situated* entities differently." J.S. App. 17a (emphasis added). As the district court explained, "[appellant] cannot make this showing because the reasonable premise of [Section 319] is that" candidates who spend more than $350,000 of their own money on a House campaign are "situated differently from those who lack the resources to fund their own campaigns." *Ibid.*

The Court in *Buckley* held that "the Constitution does not require Congress to treat all declared candi-

dates the same for public financing purposes." 424 U.S. at 97. The Court rejected equal protection challenges to the FECA criteria used to determine whether and to what extent presidential candidates would receive public funding. *Id.* at 97-108. And, as explained above, the Court held that public funds could be denied to any candidate who refused to abide by statutory spending limits. That holding establishes that, while Congress may not *require* compliance with statutory spending caps, it may permissibly treat candidates who adhere to such limits as differently situated from those who decline to do so, even when both candidates seek the same electoral office. Appellant is therefore wrong in arguing (Br. 57) that, for equal protection purposes, "[a] self-financed candidate and her opponents are fundamentally similar because they are all competing for the same House seat." There is no reason to regard Section 319's differentials in the amounts of money that candidates may receive from private contributions as more suspect than analogous differentials in the distribution of federal funds.

Appellant further contends that Section 319 violates equal protection principles because (a) the equalization of electoral opportunities for wealthy and non-wealthy candidates is not a legitimate government interest (Br. 57), and (b) the statute treats accumulated personal wealth differently from funds raised from private donors under BCRA's contribution limits (Br. 58). Framed as First Amendment arguments, those contentions lack merit for the reasons stated at pp. 34-38 and 38-39, *supra*. They are no more persuasive when repackaged as equal protection theories.

III. SECTION 319's DISCLOSURE REQUIREMENTS ARE CONSTITUTIONAL ON THEIR FACE

Section 319 creates three new reporting requirements for self-financing candidates: a declaration of intent to self-finance, an initial notification that the candidate has spent more than $350,000 of personal funds, and additional notifications within 24 hours of each $10,000 in aggregate expenditures of personal funds. 2 U.S.C. 441a-1(b) (Supp. V 2005). Except for the declaration of intent, similar information is ultimately disclosed under FECA provisions that long predate Section 319, and the constitutionality of those statutory predecessors was upheld by this Court in *Buckley*. See 424 U.S. at 66-68, 80-82; p. 5, *supra*. As the district court correctly held (J.S. App. 6a-7a), appellant established a judicially cognizable injury resulting from Section 319's disclosure requirements. Because ppellant loaned his campaign more than $350,000, he was subject to those requirements even though his opponent did not ultimately invoke Section 319's modified contribution and coordinated-expenditure limits. And while Section 319's disclosure obligations do not differ substantially from the pre-existing FECA requirements, the differences are sufficient to constitute an Article III "injury in fact."

On the merits, however, appellant has identified no colorable basis for holding that the challenged disclosure requirements are unconstitutional on their face. Because the disclosure requirements at issue here pertain solely to a self-financing candidate's own campaign spending, they do not implicate the privacy interests of donors or other supporters. Appellant does not challenge the generally applicable FECA disclosure requirements, and he makes no meaningful effort to explain why the insubstantial differences between those require-

ments—which this Court has upheld—and Section 319's disclosure provisions should be accorded any constitutional significance.

A. The provisions at issue in *Buckley* required disclosure by candidate committees and other political committees of the contributions of any person who had given in excess of $100 in a calendar year, as well as disclosures by any person making an independent expenditure of over $100. See 424 U.S. at 63, 74-75. Because compelled disclosure of contributors' names "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court reviewed the provisions to determine whether there was a "relevant correlation or substantial relation between the government interest and the information required to be disclosed." *Id.* at 64 (internal quotation marks omitted) (quoting *Bates* v. *City of Little Rock*, 361 U.S. 516, 525 (1960), and *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963)). The Court found that the disclosures required by FECA bore a "substantial relation" to the important governmental interests of (a) encouraging maximum transparency in political activity by providing financial information to the public, (b) facilitating enforcement of substantive funding regulations, and (c) deterring actual or apparent corruption. *Id.* at 66-68, 80-82; see p. 5, *supra*. The disclosure of independent expenditures, the Court noted, was "a reasonable and minimally restrictive method of furthering First Amendment values by opening up the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82.

The disclosure requirements at issue here are significantly *less* intrusive than the requirements this Court has previously upheld. Disclosure of a self-financing can-

didate's spending does not reveal the names of supporters and therefore does not implicate the privacy interests of persons other than the candidate himself. Like the disclosure provisions upheld in *Buckley*, moreover, Section 319's disclosure requirements serve important government interests. Knowing that a candidate is funding his campaign from accumulated wealth, rather than from a broad base of supporters, "provides the electorate with information 'as to where political campaign money comes from * * * ' in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67 (footnote and citation omitted).[15] Disclosure regarding personal spending also deters corruption and its appearance, and enables the gathering of data necessary to detect violations of the contribution limits, because of the possibility that money received from private donors may be misrepresented to be part of the candidate's personal wealth. In addition, as appellant concedes (Br. 19), timely reporting of a self-financing candidate's expenditures of personal funds furthers the operation of Section 319's funding provisions.

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[15] Appellant suggests (Br. 46) that some voters may find self-financing candidates attractive because such candidates are "not beholden to individual, party, and committee donors." Other voters may view with suspicion a candidate who eschews efforts to attract the broad public support that is necessary to raise substantial funds under BCRA's contribution limits. Other voters may not view the information as inherently positive or negative but may be prompted to investigate the underlying source of personal wealth being brought to bear for insights into how the candidate may vote, much as they might do in evaluating the sources of contributions. For any of those classes of voters, information concerning the extent to which a particular candidate relies on personal wealth to finance his campaign is relevant to the voter's assessment of the candidate's worthiness for public office.

B. Since *Buckley*, FECA has subjected *all* federal candidates to disclosure requirements similar to those imposed by Section 319. See pp. 5-6, *supra*. A candidate's name, the office sought, the date and amount of each expenditure of personal funds, and the total amount of personal funds spent to date in a particular election cycle all must be publicly disclosed either in a candidate's Statement of Candidacy, 2 U.S.C. 432(e)(1); 11 C.F.R. 101.1, or on the periodic reports each candidate's committee must file, 2 U.S.C. 434(b); 11 C.F.R. 104.3. Thus, appellant would ultimately have been required to disclose all of the information that Section 319 requires to be contained in the initial and additional reports of personal funds spending. Section 319's disclosure requirements go beyond those imposed by pre-existing provisions of law only in that (1) Section 319 requires each candidate to file a declaration of intent regarding projected expenditures of personal funds, and (2) Section 319 requires self-financing candidates to disclose certain information at an earlier date than would have been required under pre-existing FECA provisions. Neither of those requirements imposes a burden of constitutional dimension.

1. Although Section 319's "declaration of intent" requirement has no close analog in pre-BCRA law, that requirement places no significant burden on self-financing candidates. Under Section 319, each candidate for federal office must provide, within 15 days after becoming a candidate, an estimate of the amount (if any) by which his campaign-related expenditures of personal funds will exceed $350,000. See 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005); J.A. 102-103. As its name implies, the declaration is a statement of current *intent*, not a binding decision as to the amount of personal funds that the

candidate will spend. The filing of a declaration of intent does not preclude the candidate from ultimately spending more (or less) than the projected amount of personal funds if circumstances change, and the Commission has never commenced an enforcement action premised on the alleged falsity of the declaration.

The requirement that a declaration of intent be filed does not violate the First Amendment rights of any candidate. Appellant's contention (Br. 38) that the declaration of intent "details a candidate's most sensitive, confidential information" is untenable. Far from describing the nuances of a candidate's "strategy" (*ibid.*), the declaration of intent simply provides an estimate of the amount of personal funds in excess of $350,000 that a House candidate will spend on his campaign. For appellant's own 2006 campaign, for example, the declaration of intent revealed only the information "$0.00" for the primary election and "$1,000,000" for the general election. J.A. 103. Moreover, the basic information that is the subject of the declaration of intent (the amount of personal funds spent on a campaign) must ultimately be disclosed in any event.

Appellant's constitutional challenge to Section 319's "declaration of intent" requirement is further undermined by the fact that appellant actively publicized the same information that he now characterizes as sensitive strategic data. On March 29, 2006, six days after filing his initial statement of candidacy with the FEC, see J.S. App. 5a, appellant issued a press release announcing his candidacy. See *Jack Davis 2006 Candidacy Announcement* (Mar. 29, 2006) <http://jackdavis.org/new/press/2006.asp>. That press release stated that appellant "self funded his campaign with over 1 million dollars in [2004] and will do that again." *Ibid.* Appellant himself

contends (Br. 46), moreover, that a self-financing candidate's "personal spending not only conveys his general electoral message, it is often an integral element of that message." It is therefore especially unlikely that the declaration of intent required by Section 319 will result in the disclosure of information that the self-financing candidate regards as sensitive or confidential. Certainly there is no basis to assume, for purposes of a facial challenge such as this, that the declaration will typically result in disclosure of sensitive or confidential information.[16]

2. Section 319 further provides that a self-financing candidate must file (a) an initial notification within 24 hours after making or obligating aggregate campaign-related expenditures from personal funds of more than $350,000 and (b) an additional notification whenever the candidate spends a further increment of more than

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[16] If a particular candidate believed that the declaration would impose an unconstitutional burden because of the unique circumstances of his own campaign, he could of course bring an as-applied challenge. The timing and frequency of the declaration are not constitutionally burdensome. Only one declaration is required, and it covers both the primary and general elections. See, *e.g.*, J.A. 102-103. The declaration is incorporated into the long-required Statement of Candidacy, so that no additional forms need be filed. *Ibid.* Fifteen days is the same amount of time Congress set for all candidates to designate a campaign committee. 2 U.S.C. 432(e)(1). Advance disclosure requirements regarding expenditures of $10,000 or more for "electioneering communications" were found constitutional in *McConnell* because they "d[o] not prevent anyone from speaking." 540 U.S. at 201 (citation omitted). The brief report seeks only easily ascertainable information wholly within the knowledge of the candidate and candidate's committee, and could be completed and filed within minutes. See, *e.g.*, J.A. 102-103. It does not require disclosure of the names of supporters, the source of the personal funds, or the manner in which the money will be spent to support the candidate's campaign.

$10,000 of personal funds on his campaign. See 2 U.S.C. 441a-1(b)(1)(C)-(D) (Supp. V 2005). Those provisions ensure, inter alia, that opposing candidates are promptly apprised of information bearing on their entitlement to invoke Section 319's expanded contribution limits. Because every federal candidate must ultimately disclose the amount of personal funds expended on his campaign, Section 319's initial and additional notification requirements affect only the timing, not the substance, of the required disclosures. See J.S. App. 16a.

As the district court correctly concluded, Section 319's timing requirements do not impair appellant's rights under the First Amendment, particularly because those requirements "are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." J.S. App. 16a; see *McConnell*, 540 U.S. at 196-201. The 24-hour deadline to disclose the making or obligating of personal funds is not unique to Section 319. Any person making disbursements in an aggregate amount in excess of $10,000 in a calendar year on "electioneering communications," as defined in BCRA, 2 U.S.C. 434(f)(3) (Supp. V 2005), must report those disbursements within 24 hours. 2 U.S.C. 434(f)(1) (Supp. V 2005). This Court upheld that requirement, noting that "the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant." *McConnell*, 540 U.S. at 200. In addition, all candidates must report contributions of $1000 or more received between two and 20 days before an election within 48 hours of receipt, even if the contribution is from the candidate. 2 U.S.C. 434(a)(6) (2000 & Supp. V 2005).

3. The district court also correctly explained that "any burden that [Section 319's] reporting provisions

may hypothetically impose is not 'unilateral'" because "[t]he opponent of a self-financing candidate also faces additional reporting requirements, which are similar to those of the self-financed candidate[]." J.S. App. 16a. Under Section 319, *all* candidates must file a declaration stating whether they intend to spend personal funds in excess of the statutory threshold. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005); see J.A. 103 (FEC form states: "If you do not intend to expend personal funds exceeding the threshold amount for either [the primary or general] election, you must enter '0.00' for each."). The opponent of a self-financed candidate must (1) calculate the OPFA when the threshold is reached and each time the self-financed candidate reports an additional $10,000 expenditure and file a notice within 24 hours if and when the new OPFA entitles the candidate to solicit increased contributions; (2) file a notice with the Commission and the national and state committees of his political party within 24 hours if and when increased contributions received have reached the proportionality cap; and (3) report any refunds of money raised under Section 319. 11 C.F.R. 400.30(b), 400.31(e)(1)(ii), 400.54.

Moreover, if the opponent of a self-financing candidate accepts increased contributions from individuals under Section 319, these contributions must be reported in the same format as all contributions above $200, in mandatory periodic reports, with an indication that the particular contribution was permitted pursuant to Section 319.[17] Additionally, political parties that make coor-

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[17] See Schedule A of *FEC Form 3, Report of Receipts and Disbursements for an Authorized Committee* (Feb. 2003) <http://www.fec.gov/pdf/forms/fecfrm3.pdf> (providing a check-box for the committee to inform the Commission, opponents, and the public that a particular con-

dinated expenditures under Section 319 must report, within 24 hours, those expenditures to the FEC and to the candidate on whose behalf the money was spent. 11 C.F.R. 400.30(c)(2). The reporting requirements that apply to self-financing candidates are thus part of a larger disclosure regime, not a unique imposition on a discrete class of individuals. This Court has upheld such requirements in *Buckley* and *McConnell*, and there is no basis for a different result here.

CONCLUSION

The appeal should be dismissed on the ground that the case is moot. In the alternative, appellant's challenge to Section 319's increased contribution limits should be dismissed for lack of standing, and the judgment of the district court with respect to Section 319's disclosure requirements should be affirmed.

Respectfully submitted.

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MARCH 2008

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tribution was permissible due to "Limits Increased Due to Opponent's Spending (2 U.S.C. §441a(i)/441a-1)").

APPENDIX

[LOGO]

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED APR 19 2006

Jack Davis
Jack Davis for Congress
P.O. Box 2004
Akron, NY 14001

Robert R. Davis, Treasurer
Jack Davis for Congress
P.O. Box 2004
Akron, NY 14001

RE: MUR 5726
Jack Davis
Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer

Dear Messrs. Davis:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, the Commission, on April 4, 2006, found that there is reason to believe Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C) and 441a-1(b)(1)(D), provisions of the Federal Election Campaign Act of 1971,

as amended ("the Act"), and 11 C.F.R. §§ 400.21(b) and 400.22(b). Additionally, the Commission found that there is reason to believe that Jack Davis violated 2 U.S.C. §§ 441a-1(b)(1)(C) and 441a-1(b)(1)(D). The Factual and Legal Analyses, which formed a basis for the Commission's findings, are attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved. If you are interested in expediting the resolution of this matter by pursuing pre-probable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public. If you have any questions, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Michael E. Toner
Chairman

Attachments

1. Davis Factual and Legal Analysis
2. Jack Davis for Congress Factual and Legal Analysis
3. Proposed Conciliation Agreement
4. Designation of Counsel Form

REPLY BRIEF

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26 pgs

No. 07-320

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IN THE

Supreme Court of the United States

JACK DAVIS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

No. 07-320

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

INTRODUCTION

Unique among campaign finance laws, Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 319, 116 Stat. 109-12 (2002) (codified as amended at 2 U.S.C. § 441a-1), handicaps select candidates to promote an ill-defined governmental interest in equality. Analogies to the regulation of private contributions, corporate spending, and public financing do not validate Section 319's burden. In aim and effect, the provision violates the First and Fifth Amendment rights of self-financed candidates.

I. SECTION 319 BURDENS THE POLITICAL SPEECH OF SELF-FINANCED CANDIDATES WITHOUT REGARD TO PERSONAL WEALTH.

A. The Federal Election Commission ("FEC") propagates two canards initially offered by Congress to justify enactment of Section 319. First, the provision is not a "modest" effort to "decrease the influence of personal wealth in congressional elections." Brief of Appellee FEC (FEC Br.) 14. Rather, by affecting individuals contemplating using *any* amount of personal funds in a race for the United States House of Representatives, the broad provision attempts to deter—and failing that, penalize—any meaningful level of personal expenditures.

Section 319 regulates not just the "wealthy" trying to "buy a seat in Congress." FEC Br. 14. As the FEC's enforcement record demonstrates, the provision handicaps candidates who encumber their home equity, retirement benefits, or personal savings to participate in the political process. *See, e.g.*, Brief of *Amici* Gene DeRossett & Edgar Broyhill (DeRossett Br.) 1-2. One 2004 Congressional candidate who was penalized by the FEC for his failure to disclose personal expenditures mortgaged his house to raise $400,000 in campaign funds. *Id.* at 8 n.6. Because the $350,000 benchmark is not indexed for inflation, the statute's coverage in future elections will encompass increasingly modest personal expenditures. Meanwhile, the cost of a competitive House race continues to soar. *See* Brief of Appellant Jack Davis (Davis Br.) 23-24 (discussion of indexing); 52-53 (increasing cost of House races).

Paradoxically, Section 319 overlooks a much larger class of millionaires—the incumbents whose personal

wealth is found in "war chests" containing millions of dollars of private contributions. Because the provision does not account for the assets of these millionaires, the assertion that Section 319 diminishes the importance of *wealth* in House races must be rejected. The provision is more accurately described as regulating the use of *personal funds* to benefit candidates relying on *private contributions*.

B. The FEC also parrots Congress's claim that Section 319 fosters equality in elections "where a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support." FEC Br. 17. As this Court has repeatedly stated, however, a candidate's personal spending does not "distort" the electoral process: "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (per curiam). Instead, voters "retain control over the quantity and range of debate." *Id.*; *see also Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (Congress has no authority to regulate speech based on the "fear that voters might make an ill-advised choice . . . in the course of a political campaign."). Even the FEC acknowledges the range of voters' potential responses to a candidate's personal expenditures. *See* FEC Br. 48 n.15. Yet, by regulating personal expenditures, Congress conveys to the electorate that this form of communication is "itself thought to be harmful." *Buckley*, 424 U.S. at 17 (citation and quotation marks omitted).

Nor does the record establish that the public actually perceives that wealthy individuals are unfairly—much less corruptly—purchasing congres-

sional seats. The only evidence provided by the FEC are Members' statements during debate expressing trepidation about the influence of personal expenditures. *See* FEC Br. 6-7; FEC's Statement of Material Facts ¶¶ 9-40, Joint Appendix (J.A.) 72-82. But the self-interest of Section 319's primary beneficiaries is hardly sufficient to demonstrate public sentiment.

Indeed, the author of the expert report submitted by the FEC has questioned the effectiveness of personal campaign expenditures: "Self-financers usually don't win. When they do, it isn't their money alone that puts them in office." Jennifer Steen, *Maybe You Can Buy an Election, But Not With Your Own Money*, WASH. POST, June 25, 2000, at B1. Given the lack of evidence that elections are won by personal spending alone, congressional misgivings about self-financed candidates usurping the voters' choice are misplaced. Data from the last few elections shows that few self-financed candidates have won their elections, and that many other factors, such as ethics scandals or other controversies, often affect the outcome. *See* DeRossett Br. 22-25.

Finally, Section 319's purported curative value remains unexplained. Increasing the money that candidates may receive from their wealthiest donors or national parties is an ill-considered approach to restoring the "usual link" between candidates and the general public. Nor does the FEC explain why, unlike personal expenditures, a war chest of funds raised during previous campaigns accurately represents current public sentiment about a privately financed candidate.

II. SECTION 319 INFRINGES ON SELF-FINANCED CANDIDATES' CONSTITUTIONAL RIGHTS.

A. The parties' constitutional dispute focuses on whether Section 319 infringes on a self-financed candidate's "core" political speech. In invalidating the previous limitations on personal expenditures, this Court held that the "First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. Echoing the district court's rationale in upholding Section 319, *see* Appendix to the Jurisdictional Statement (J.S. App.) 13a, the FEC answers that the new regulations do not "burden political speech because they place no restrictions whatever on a candidate's ability to spend personal funds in support of his own campaign." FEC Br. 16.

This assertion is irrelevant to any principled legal analysis, as it elides this Court's contrary "compelled access" precedent. Claiming that a statute does "not amount to a restriction of appellant's right to speak because 'the statute in question here has not prevented [a party] from saying anything it wished' begs the core question." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (rejecting right of reply statute). Viewing Section 319 through this lens, it is evident that the authorization of extra-limit contributions for the opponents of a self-financed candidate imposes significant constitutional harms. "Appellant, does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Pacific Gas & Elec. Co. v. Pub.*

Util. Comm'n of Cal., 475 U.S. 1, 14 (1986) (quoting *Buckley*, 424 U.S. at 49 and n.55).

The opinion in *Pacific Gas & Electric Co.*, which invalidated a statute requiring a utility company to include with its bills materials from an opposing consumer group, returns this analysis to the electoral context. That decision is derived from *Buckley's* rejection of expenditure limitations that "impose[ ] a substantial restraint on . . . protected First Amendment expression." 424 U.S. at 52. For purposes of the First Amendment, then, it is irrelevant whether the regulation imposes an absolute ceiling on electoral expenditures or creates a different type of impairment. "To the extent that a candidate's campaign is enhanced by the operation of the statute, the [opposing] political speech of the individual . . . is impaired." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). *See* Davis Br. 42-44; *see also* DeRossett Br. 12-13; Brief of *Amicus* James Madison Center (JM Br.) 25.

Section 319 expressly confers benefits on the opponents of a candidate making personal expenditures. The self-financer must ply his opponents with contemporaneous, strategic disclosures about his spending. His personal expenditures bolster his opponents' fundraising opportunities and, ultimately, may enhance his competitors' voices. The FEC never distinguishes this Court's compelled access cases nor explains why Section 319 does not similarly infringe on a self-financed candidate's First Amendment rights.

B. In lieu of direct support from precedent, the FEC likens this matter to *Buckley's* approval of public funding in presidential campaigns. As detailed in Mr. Davis's opening brief, public funding

jurisprudence does not apply to a statute that increases private contributions to candidates. Davis Br. 53-56. Nonetheless, the FEC argues that "*Buckley* establishes that a candidate's insistence on spending personal funds in amounts exceeding the statutory threshold may legitimately be treated by Congress as a ground for withholding a federal subsidy to which the candidate would otherwise be entitled." FEC Br. 30 (citing *Buckley*, 424 U.S. at 57 n.65). This claim, which represents a significant retrenchment from the district court's more expansive public funding analysis, J.S. App. 11a-13a, still misreads *Buckley*.

Buckley held that presidential public funding "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." 424 U.S. at 92-93. *Buckley* never sanctioned withholding federal subsidies in response to a candidate's spending behavior. Instead, this Court concluded that the provision of public funds simply *replaces* the amount of private contributions that would normally be raised by participating major party candidates. *Id.* at 95 n.129. Ironically, this Court found that Congress intended to "reduce the deleterious influence of large contributions on our political process." *Id.* at 91. The FEC's use of *Buckley's* public funding analysis to bolster a statute that fosters additional private contributions is, thus, particularly misplaced.[1]

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[1] Alluding to the issue of compelled access, *Buckley* also noted that the public funding "scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n.124 (citation omitted). Of course, the same cannot be said for the provision at issue here.

Section 319, unlike public financing of elections, also fails to "facilitate" or "enlarge" the public's role in the electoral process. By tripling contribution limits, Section 319 does not expand the pool of donors; it simply permits candidates to re-solicit supporters who have already provided the maximum $2,300 per election contribution. Those donors can provide an *additional* $4,600 to the candidate, for a total contribution of $6,900. Only the excess funds, however, count toward Section 319's cap on extra-limit contributions, purportedly needed to create "parity." *See* FEC Br. 41 n.14. Thus, rather than facilitating the involvement of a greater number of contributors, Section 319 increases the influence of well-heeled donors. It also diminishes the impact of those citizens who lack the resources to provide extra-limit contributions or who wish to make higher contributions to self-financers. *See* DeRossett Br. 15-17 (Section 319 "disabl[es] contributors from associating with a self-financed candidate to the same extent they may associate with his opponent." *Id.* at 15).

As for increasing the "volume of campaign-related speech," FEC Br. 16, Section 319 discourages non-wealthy candidates from borrowing against their personal assets to finance their candidacies. *See* DeRossett Br. 1-2, 8 n.6. For a candidate whose best financial option is to make a personal loan secured by, say, a home mortgage, there is no mechanism to "roll back" Section 319's calculations once that candidate repays the loan with contributions from private donors. *See* JM Br. 4-5 n.2; FEC Adv. Op. 2003-31 (Dec. 19, 2003). This may significantly chill a non-wealthy candidate's decision to enter the race.

Nor does the regime confer any benefit on minor-party or little-known candidates who are dissuaded from self-financing because they fear aiding their opponents or suffering civil and criminal penalties for reporting errors. Having forgone the option of personal expenditures, these candidates—who may lack access to large donors and be unable to raise sufficient campaign funds under any limits—receive no boost from the provision.

C. The FEC also refers to *Buckley's* public financing analysis to address Mr. Davis's equal protection claim that Section 319 treats him differently than his similarly situated opponents: "There is no reason to regard Section 319's differentials in the amounts of money that candidates may receive from private contributions as more suspect than analogous differentials in the distribution of federal funds." FEC Br. 45. This comparison is not analogous, as public funding comports with the Fifth Amendment for the precise reason that Section 319 violates the Constitution.

The appellants' equal protection challenge to the presidential funding provision in *Buckley* asserted that minor-party candidates did not receive the same financial benefits as their major-party opponents. Rejecting that claim, *Buckley* held that the provision of such funds did not "enhance" a major-party candidate's "ability to campaign," 424 U.S. at 95 n.129, and could also "be viewed as a supplement" to any private contributions raised by minor-party candidates. *Id.* at 99. In comparison, Section 319's *only* purpose is to diminish the self-financed candidate's purported competitive advantage during the campaign. In short, governmental provision of public funds operates without consideration of the

competitive balance in a campaign while Section 319 expressly aims to "level the playing field" among opposing candidates.

D. The FEC offers two additional rationales for Section 319. First, the government cites the district court, J.S. App. 14a, in maintaining that Mr. Davis's campaign expenditures preclude a claim that he was "chilled" by operation of the statute. FEC Br. 26. *Buckley's* rejection of expenditure limitations, however, establishes that a complete chill is not required to demonstrate harm to core political speech. "[T]he equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S. at 56-57; *see also* JM Br. 6-7. As Mr. Davis detailed in his opening brief, his campaign suffered significant handicaps due to Section 319's operation. Davis Br. 34-44.[2] Given his very public reliance on personal funds, the simple existence of Section 319 provides

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[2] The FEC ignores two related issues. First, this is a facial First Amendment challenge under which a law may be overturned as impermissibly overbroad because a "substantial number" of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber*, 458 U.S. 747, 770 and n.25 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, while Mr. Davis's experience is instructive, it is not determinative. Because Section 319 operates by virtue of statutorily-defined formulae aiding one class of candidates, it *always* benefits the opponents of a self-financer, regardless of any specific evidence of chilling of that candidate. Second, as illustrated by *amicus* Gene DeRossett and others cited in his brief, Section 319's $350,000 threshold regulates decidedly non-wealthy candidates whose electoral decisions will be particularly susceptible to chill. *See* DeRossett Br. 12-13.

Mr. Davis's opponents with a substantial sword to wield in their race. They may ask, "If self-funding is not corrupting, why is there a law curbing its impact?" *See Buckley*, 424 U.S. at 17 (congressional regulation conveys message that communication is harmful).

The FEC also contends, without support of precedent, that by preserving the "status quo" limits for candidates who spend less than $350,000, Section 319 actually benefits such candidates. FEC Br. 31-33. Similarly, it maintains that any self-financed candidate is "clearly better off . . . than he would be if campaign fundraising were unregulated." *Id.* at 33 n.9. Setting aside the significant tailoring concerns about Section 319, these assertions ignore this Court's bar on placing unconstitutional conditions on the receipt of a government-conferred benefit. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). *See also* Brief of *Amicus* The Cato Institute (Cato Br.) 6-7.

Given that the Constitution protects a candidate's right to make personal expenditures without ceiling, *Buckley*, 424 U.S. at 52, Congress may not condition the "benefit" of lower contribution limits for a candidate's opponents in return for his agreement to

cabin his protected speech. As such, Section 319's extra-limit contribution regime would violate the First Amendment even if, as the FEC proffers, the "default contribution limit [were] higher" and were "reduced only if an opposing candidate certified that he would not self-finance beyond a certain limit." FEC Br. 32 n.8. From either perspective the practical and legal effects are the same; the government may not penalize a self-financed candidate's refusal to limit his personal expenditures advocating his own election.

III. THE GOVERNMENT HAS NO COMPELLING INTEREST IN "LEVELING THE PLAYING FIELD."

The asserted governmental interest in "leveling the playing field" in congressional campaigns is both novel and legally unsustainable. Although the FEC attempts to distinguish *Buckley* on this issue, it ignores significant legal impediments to its claim. FEC Br. 34-39 and 35 n.10.

A. In *McConnell v. FEC*, this Court described some appellants' asserted equality interest as a "broad and diffuse injury" insufficient even to establish standing to challenge, *inter alia*, Section 319. 540 U.S. 93, 227 (2003). *McConnell* addressed claims that higher contribution limits deprived some voters of "an equal ability to participate in the election process based on their economic status" and imposed a "competitive injury" on their ability to raise funds for their candidates. *Id.* at 227-28. This Court held, however, that a party's claim of "curtailment of the scope of their participation in the electoral process" was "not [ ] a legally cognizable right." *Id.* at 227 (citing, *inter alia*, *Buckley*, 424 U.S.

at 48). If an asserted equality goal is insufficient for purposes of standing it certainly cannot establish a compelling interest for constitutional purposes. *See McConnell*, 540 U.S. at 227. ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal.").

B. Because no precedent supports this equality interest, the FEC relies on case law addressing corporate electoral activities. FEC Br. 35-37 (citing *FEC v. Beaumont*, 539 U.S. 146 (2003) and *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)). According to the FEC, the public perception that House seats are available only to the wealthy would raise "analogous concerns" to those relating to the "corrosive and distorting effects" of corporate aggregations of wealth. FEC Br. 36 (citation omitted). However, this Court has never extended this analysis to the activities of individual candidates or donors. Nor does the FEC explain how a candidate's personal expenditures on his own behalf resemble a corporation's political activities.

As the FEC asserts repeatedly, Section 319 is aimed at reducing the influence of "wealth" to "level the playing field." *See, e.g.*, FEC Br. 37 (Section 319's "core rationale" is "diminishing the importance of personal wealth as a criterion for election to federal office"). Conversely, *Austin* expressly stated that the accumulation of "large amounts of wealth" was not the justification for imposing limitations on corporate political expenditures and that such regulation "does not attempt to 'equalize the relative influence of speakers on elections.'" 494 U.S. at 660. The corporate cases cited by the FEC do not inform this matter.

IV. SECTION 319 IS NOT SUFFICIENTLY TAILORED TO SATISFY ANY APPLICABLE LEVEL OF SCRUTINY.

A. The FEC disputes Mr. Davis's assertion that strict scrutiny should be applied to Section 319. FEC Br. 37 n.11 (citing *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (plurality opinion)); *contra* Davis Br. 44-46. Even under the standard applied in *Randall*, however, this Court must "review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Randall*, 126 S. Ct. at 2492.

In response to Mr. Davis's explication of Section 319's infirmities, Davis Br. 47-53, the FEC simply defers to congressional platitudes, astonishingly describing the provision as "carefully crafted." FEC Br. 41-42 n.14. The FEC's only defense for Section 319's failure to account for war chests is that the "choice was Congress's to make." *Id.* at 39 n.12. This response is insufficient, particularly in light of this Court's skeptical eye toward provisions affecting the competitiveness of elections. *See, e.g., Randall*, 126 S. Ct. at 2494-501 ("examination of the record" reveals that "contribution limits are too restrictive"); *see also* Davis Br. 32-34 (courts need not defer when Congress legislates in its own interest). An independent review of the record in this matter reveals that Section 319 is not tailored to achieve the asserted equality aims.

B. As detailed in Mr. Davis's brief, Section 319 does not equitably account for all funds in a campaign. Davis Br. 8-12. The FEC argues that "by taking account of the funds raised prior to the election year, Congress sought to ensure that incumbents do

not unduly benefit from 'war chests' they may have built up in advance." FEC Br. 39 n.12. However, this statement misstates the effect of the Opposition Personal Funds Amount ("OPFA") calculation, 2 U.S.C. § 441a-1(a)(2). That formula recognizes only funds raised in the year *before* the general election, although it discounts that total by one-half. The OPFA calculation ignores all war chest funds raised in previous elections cycles and all contributions made during the election year. For example, prior to the 2006 election cycle, Mr. Davis's opponent wielded a $1.1 million war chest. *See* Davis Br. 13. Yet, the OPFA calculation ignored this bounty in authorizing Mr. Reynolds to collect an additional $1.4 million in extra-limit funds.

Addressing these higher limits, the FEC cites *Buckley* for the proposition that a "court has no scalpel to probe" marginal differences in contribution limits. 424 U.S. at 30. *Buckley* continued, however, that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* Tripled individual contribution limits, with the $4,600 excess exempted from individuals' aggregate contribution ceilings, create just such a qualitative difference. Similarly, Section 319's authorization of *unlimited* party coordinated communications—expenditures that are the functional equivalent of candidate contributions—eviscerates the normal limit on such spending.

The FEC also assures this Court that Section 319 operates to "level the playing field." FEC Br. 8, 38. Yet the government never addresses Mr. Davis's personal experience to the contrary. Davis Br. 12-13. As the record reveals, during the 2006 campaign Section 319 authorized Mr. Davis's opponent to

receive about $1.4 million in extra-limit funds. The formula authorized the provision of these funds to Mr. Reynolds despite his sizable war chest and his $2.8 million spending advantage at the conclusion of the campaign. *See id.* Mr. Davis's experience is not anomalous, as the statutory formulae for extra-limit contributions always undercount private donations. *See id.* at 11-12. The FEC never explains how the authorization of $1.4 million in extra-limit contributions to the highest spending candidate in the race levels the playing field.

V. THIS COURT HAS JURISDICTION TO DECIDE THIS CONTROVERSY.

A. Mr. Davis has standing because he retains a personal stake in the resolution of this matter. The FEC argues that because this controversy arose in the context of the 2006 congressional election no live dispute remains. After much discussion of the mootness of Mr. Davis's claims, the FEC concedes that should Mr. Davis "make[] his intent to run a future self-financed House campaign clear in his reply brief or elsewhere, it will effectively moot this mootness discussion." FEC Br. 20-21 n.5. Although he has not filed an official declaration of his candidacy, Mr. Davis has stated publicly that he intends to use personal funds to pursue New York's 26th District seat in the United States Congress in the 2008 election cycle. Jill Terreri, *Democrat Davis Confirms He'll Run Again for Congress*, ROCHESTER DEMOCRAT & CHRONICLE, Mar. 27, 2008, at 5B (reporting that Mr. Davis is planning to announce formally his self-financed candidacy on April 15). By the FEC's admission, then, this matter is not moot.

Even without evidence of his intent to pursue federal office, however, Mr. Davis's claims regarding Section 319's impact on his campaign during the 2004 and 2006 election cycles remain live. The FEC misstates the mootness test for claims that arise during an election cycle but conclude before litigation can reach this Court. For example, *Storer v. Brown*, 415 U.S. 724 (1974), considered a constitutional challenge to a California ballot access law originally filed in advance of the 1972 election. Although the case did not reach this Court until 1973, this Court applied the "capable of repetition, yet evading review" doctrine, noting that "this case is not moot, since the issues . . . will persist as the California statutes are applied in future elections." *Id.* at 737 n.8.

In claiming this exception to mootness, a party must show that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wisconsin Right to Life, Inc. ("WRTL")*, 127 S. Ct. 2652, 2663 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). This Court has repeatedly determined that an election cycle is too short a period in which litigation can be reasonably expected to be resolved. *See Storer*, 415 U.S. at 737 n.8; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978) (same). As for the second prong, the recurring injury test, the FEC relies on *WRTL* to assert that a reasonable expectation of the same future injury is manifested where "the same controversy will recur involving the same complaining party." FEC Br. 20 (citing *WRTL*, 127 S. Ct. at 2663 (citation omitted)). In *WRTL*, however, this Court found that the FEC

requested "too much" when it argued that the WRTL organization "must establish that it will run ads in the future sharing all 'the characteristics that the district court deemed legally relevant.'" 127 S. Ct. at 2663 (citation omitted). Thus, Mr. Davis need not declare that he will conduct future campaigns in exactly the same manner as in previous election cycles to counter the FEC's assertion of mootness.

The FEC also omits the alternate recurring injury test articulated in *WRTL*, which permits a party to show that she is "subject to the threat of prosecution under the challenged law." *Id.* (citation omitted). Even absent his stated intent to run again, Mr. Davis faces potential prosecution and penalties under Section 319 for his alleged failure to comply with the law's disclosure requirements during the 2004 election. Obviously, this Court's favorable resolution of his claims would remove the threat of prosecution.

Finally, the FEC's mootness claim ignores Mr. Davis's attempt to expedite litigation of this case pursuant to BCRA § 403(a)(4). *See* Davis Br. 4-5. The FEC's opposition to the motion to expedite, the district court's denial of that motion, and the 14 month delay between filing and the district court's decision thwarted this effort. Indeed, the FEC actively pursued its action relating to the 2004 campaign until Mr. Davis filed his notice of appeal with this Court. *See* Davis Br. App. 10a (agreement to hold claim in abeyance pending final resolution). Both BCRA § 403(a)(4) and the opinion in *WRTL* recognize the need for claims to be "expedited 'to the greatest possible extent.'" *WRTL*, 127 S. Ct. at 2662 (citation omitted). To punish Mr. Davis for the district court's failure to follow this mandate would undermine BCRA's command for swift adjudication.

B. Both the imminent threat of prosecution by the FEC and the harm imposed by Section 319 confer standing on Mr. Davis. His decision to personally finance his 2008 federal campaign will, of course, expose him to Section 319's regulations, burdening his speech and providing his opponents with significant financial and informational benefits. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), this Court held that the possibility that protected speech could be chilled by a particular statute in the future was enough to confer standing on a party to challenge the law: "We have fashioned this exception to the usual rules governing standing . . . because of the ' . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper calculation.'" *Id.* at 486-87 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (citation omitted).

Moreover, the FEC has demanded a $251,000 civil penalty in its enforcement action against Mr. Davis. Davis Br. App. 8a. *Dombrowski* states that a chilling effect on the exercise of protected speech "may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. The FEC's pending action and the attendant threat of prosecution is sufficient to confer standing on Mr. Davis for his current claims and to rebut any charge that his claims are moot. *See WRTL*, 127 S. Ct. at 2662 (citation omitted).

VI. SECTION 319'S DISCLOSURE AND CONTRIBUTION PROVISIONS ARE PART OF AN INTEGRATED REGIME THAT IS NOT SUSCEPTIBLE TO SEVERANCE.

Congress enacted Section 319 as an integrated provision designed to stymie personal expenditures in House elections. The FEC rests both its constitutional analysis and its claim that Mr. Davis lacks standing on its bisection of Section 319 into separate disclosure and contribution provisions. That neither part can function separately, however, indicates that Congress intended Section 319's disclosure and extra-limit contribution provisions to operate as one. *See generally Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent.").

This inquiry is "well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley*, 424 U.S. at 108). *See also Rita v. United States*, 127 S. Ct. 2456, 2483 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment) ("The judicial role when conducting severability analysis is limited to determining whether the balance of a statute that contains an unconstitutional provision is capable 'of functioning independently.'") (citation omitted).

The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended in 1974, Pub. L. No. 93-443, 88 Stat. 1263 ("FECA") does contain a severability clause affirming the continued

validity of the Act should any particular *provision* be struck down. *See* 2 U.S.C. § 454; *see also* BCRA § 401. However, no other provision intertwines disclosure requirements with contribution limits. Compare 2 U.S.C. § 432 (general political committee organization and recordkeeping) and § 434 (reporting requirements) with the contribution limitations set forth in 2 U.S.C. § 441a. Section 319, by contrast, is codified in a single provision of the United States Code at 2 U.S.C. § 441a-1. Subsection (a) of that provision details the availability of the extra-limit contributions and subsection (b) addresses the notification of personal expenditures triggering those benefits.

Moreover, invalidation of either subsection would prevent Section 319 from achieving Congress's intended effect. The disclosure regime facilitates a candidate's receipt of benefits under the increased limits. This reporting requirement has no independent informational value to the electorate because, as the FEC repeatedly acknowledges, candidates "ultimately" report the same information about personal expenditures and loans on regular quarterly and pre- and post-election reports. *See* FEC Br. 5, 49, 50, 52. Similarly, without access to contemporaneous data about personal spending, candidates could not take prompt advantage of any extra-limit contributions available under the statutory formulae. In fact, Section 319 authorizes receipt of these contributions only after the "candidate has received notification of the opposition personal funds amount." 2 U.S.C. § 441a-1(a)(3)(A)(i). Thus, the legislative construction of Section 319 indicates that the two subsections of the statute function as a whole, and any constitutional or standing analysis should reflect that structure.

CONCLUSION

For the foregoing reasons and those stated in Mr. Davis's opening brief, this Court should find that Section 319 violates the Constitution and remand the case for appropriate declaratory and injunctive relief consistent with this Court's decision.

Respectfully submitted,

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JACK DAVIS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. The instant case is of central concern to Cato because it addresses the further collapse of constitutional protections for political speech and activity, which lies at the very heart of the First Amendment.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Section 319 of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441a-1, is facially unconstitutional because it burdens the exercise of protected self-financed political campaign speech without serving any compelling governmental interest. Section 319 penalizes a candidate who spends more than $350,000 from personal funds by enhancing the political speech of that candidate's opponent through increased contribution limits and unlimited coordinated party expenditures. Section 319 thus creates an unconstitutional *de facto* expenditure limit by chilling a self-financing candidate from engaging in protected political speech beyond that personal funds ceiling.

Section 319 also serves no compelling governmental interest. It does not prevent actual or apparent corruption because there is no threat of *quid pro quo* corruption from a candidate's expenditure of her own funds. Instead, the provision *undermines* the governmental interest in combating corruption by deterring self-financing candidates from reducing their dependence on outside contributions – all while increasing significantly the purportedly corruptive contributions and coordinated expenditures available to their opponents. Moreover, this Court has expressly rejected the district court's rationale for upholding Section 319 – "leveling the playing field" of financial resources – as an interest sufficient to justify infringement of First Amendment rights.

In addition to penalizing political speech, Section 319 further burdens protected speech and

association with compelled disclosure requirements. Those reporting provisions impose significant civil and criminal liability on the candidate personally, chilling the right to engage in unlimited self-financed political speech. The disclosure requirements also infringe on a candidate's associational right *not* to associate with campaign contributors. These additional disclosure burdens do not serve any informational interest because the underlying information ultimately is redundant of that disclosed to the FEC under preexisting requirements. Nor do they deter actual or apparent corruption, as disclosure of expenditures from personal funds cannot expose *quid pro quo* arrangements.

ARGUMENT

I. Section 319 Imposes an Unconstitutional Penalty on the Exercise of Fundamental First Amendment Rights to One's Own Political Speech.

As the three-judge district court correctly noted, to determine whether BCRA Section 319 is facially unconstitutional because it "punishes a 'substantial' amount of protected free speech," *Virginia v. Hicks*, 539 U.S. 113, 118 (2003), the Court "must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (*per curiam*)). *See also McConnell v. FEC*, 540 U.S. 93, 205 (2003) (applying strict scrutiny in facial overbreadth challenge to BCRA Section 203, Court "must examine the degree to which BCRA burdens First Amendment expression and evaluate whether a compelling governmental interest justifies that burden.") (citing *Austin*, 494 U.S. at 657).

A. By Penalizing Protected Speech, Section 319 Burdens the Exercise of Political Speech by Self-Financed Candidates.

"'The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2666 (2007) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

In *Buckley*, this Court held that the expenditure limitations contained in FECA constituted "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. The Court found that monetary expenditure limits directly restrain political speech "because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.*

Specifically with respect to FECA's limits on expenditures by candidates from their personal funds, the Court found that a "ceiling on personal expenditures by candidates on their own behalf . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression," and "thus clearly and directly interferes with constitutionally protected freedoms." *Id.* at 52-53. Therefore, the Court held the restriction on a candidate's personal expenditures unconstitutional, concluding that "fundamentally, the First Amendment simply cannot tolerate [FECA]'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. *See also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) ("The central holding in [*Buckley*] is that spending money on one's own speech must be permitted.").

Relying on the absence of a direct expenditure limit such as those invalidated in *Buckley*, the district court erroneously concluded that "the Millionaires' Amendment does not 'burden[ ] the exercise of political speech'" because it "does not limit in any way the use of a candidate's personal wealth in his run for office." *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007). Instead, the court found that Section 319 merely "provides a benefit to his opponent, thereby correcting a potential imbalance in resources available to each candidate." *Id.* This Court long has held, however, that Congress may not use the provision of such a "benefit" to indirectly "place limitations upon the freedom of speech which if directly attempted would be unconstitutional," for to deny such benefit to speakers "who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). "Its deterrent effect is the same as if the State were to fine them for this speech." *Id. See also Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("Likewise, to condition the availability of [unemployment] benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court further considered impermissible interference with First Amendment rights through the imposition of unconstitutional conditions on a government-conferred benefit, echoing *Speiser* in holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech." *Perry*, 408 U.S. at 597. "For if the

government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* *See also* *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (holding that the practice of conditioning a public benefit on the limitation of protected expression both "inhibits" that expression and "penalizes its exercise"). A statute burdening First Amendment rights by indirectly penalizing protected expression is subject to the same strict scrutiny as a direct limitation. *Buckley*, 424 U.S. at 65 ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct[.]").

Indeed, Section 319 penalizes protected expression far more directly than would unconstitutional conditions, because it provides only penalties for self-financed political speech on behalf of one's own candidacy: any purported countervailing benefit is contingent and wholly illusory. Section 319 creates a *de facto* $350,000 limit on expenditures from personal funds, avoiding *Buckley*'s proscription on explicit ceilings by instead penalizing the exercise of a First Amendment right to speak in amounts exceeding that threshold (by increasing contribution limits and eliminating coordinated party expenditure limits for the self-financing candidate's opponent). A candidate approaching that *de facto* ceiling will be deterred from engaging in further protected self-financed speech because of the certainty that such exercise of her constitutional rights will result in conferring a significant competitive advantage to her opponent. Such forced

"self-censorship" burdens First Amendment rights as surely and heavily as direct statutory restriction. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1562 (8th Cir. 1996) (Lay, J., dissenting) (finding that Minnesota's campaign finance scheme impermissibly "burdens a candidate's free speech rights by chilling her decision to increase her political speech" beyond the set spending limits).

In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995), the court, construing a Minnesota statute that "enhanced" the political speech of candidates against whom independent expenditures were made, held:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech. This "self-censorship" . . . is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship. . . . Therefore, even if section 10A.25 subd. 13 were content-neutral, the statute's negative impact on political speech must be a violation of the First Amendment rights of those who wish to make the independent expenditures at issue. The statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny.

34 F.3d at 1360, 1362. Similarly, in penalizing self-financed candidates' speech by favoring and enhancing their contribution-financed opponents' speech, Section 319 inexorably burdens self-financed candidates' protected political speech. *See Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue. . . . Such power in government to channel the expression of views is unacceptable under the First Amendment.").

Moreover, this statutory penalty cannot credibly be characterized as merely a benefit conferred upon candidates choosing not to exceed the threshold, because any such benefit is contingent on facing a candidate who spends more than $350,000 in personal funds – the very contingency the penalty is designed to eliminate. *Rosenstiel*, 101 F.3d at 1563 & n.26 (Lay, J., dissenting) (Minnesota campaign finance scheme unconstitutionally burdens free speech rights because the purported "incentives to publicly financed candidates here are contingent on their opponents' decision.").

Indeed, in most circumstances, the candidate who relinquishes her First Amendment right to speak without limit on behalf of her own candidacy receives no countervailing benefit whatsoever from Section 319, but rather is subjected to the same FECA contribution limits and coordinated party expenditure limits to which she otherwise would have been subject. *See Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) (holding that expenditure "limits are not voluntary because they

provide only penalties for non-compliance rather than an incentive for voluntary compliance.").

In *Maupin*, the court held that the challenged provision impermissibly penalized candidates exercising their right to speak without expenditure limits, by foreclosing otherwise available sources of funding and by imposing daily reporting requirements, and could not credibly be construed as an incentive because "complying" candidates received no benefit other than the continued status quo (*i.e.*, avoidance of the penalty). *Id.* The court explained:

> No candidate would voluntarily agree to comply with the expenditure limits in exchange for access to sources of funding to which he or she already has a constitutional right of access. Rather, [the Missouri statute] forces compliance by imposing substantial penalties for non-compliance. The purported benefit is illusory, and the statute is coercive.

Id. Similarly, the only benefit Section 319 provides in return for a candidate's forfeiting her right to spend personal funds on political speech without limit is the avoidance of its penalty, which is no true benefit at all.

In this way, Section 319 operates solely as a stick deterring protected self-financed expenditures rather than as a carrot encouraging participation in an alternative campaign financing scheme, burdening protected speech to the same extent as a direct expenditure limitation. The district court's analogy

to public funding statutes therefore is inapt. Unlike Section 319, the public financing schemes provide a participating candidate the benefit of public funds, therefore any additional statutory disparities or advantages arguably may be interpreted as incentives to encourage voluntary participation in an alternative scheme that provides a tangible benefit to which the participating candidate would not otherwise have been entitled. *See Rosenstiel*, 101 F.3d at 1550 (finding that "the State's scheme in this case provides certain inducements--the expenditure limitation waiver and the contribution refund in addition to a public cash subsidy--in order to encourage maximum candidate participation."); *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998) (holding that, while Kentucky's public financing scheme exerted "financial pressure to participate" on candidates, that pressure was constitutionally acceptable because "a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice."); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 467, 471 (1st Cir. 2000) (explaining "that the government may create incentives for candidates to participate in a public funding system" and finding that the Maine statute provided, in addition to the public funds themselves, "benefits [such as] the release from the rigors of fundraising, the assurances that contributors will not have an opportunity to seek special access, and the avoidance of any appearance of corruption."); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) ("Establishing unequal contribution caps

serves this multifaceted network of interests by making it more probable that candidates will choose to partake of public financing.").

By contrast, Section 319 does not incentivize participation in anything but the status quo of contribution limits and coordinated party expenditure limits, and thereby provides only disincentives and penalties for protected self-financed expression. For example, in his dissent in *Rosenstiel*, Judge Lay rejected the majority's characterization of the Minnesota statute's penalties for private financing as mere "inducements" for participation in the public finance scheme, arguing instead that they unconstitutionally burdened a candidate's free speech:

> I respectfully submit such an analysis is irrelevant in evaluating the concerns of whether the non-public financed candidate's First Amendment rights are chilled. This case is not about the publicly financed candidate's free speech rights. It is not a matter of balancing benefits with restrictions. . . . The issue is whether a candidate who faces a choice not to limit her full access to political speech will be any worse off in choosing to do so. . . . When such a choice is made, however, Minnesota's campaign finance scheme adds disincentives which make a privately financed candidate worse off than she otherwise would be. . . . The disincentives are invoked as a means to influence directly a candidate's choice (to keep the candidate in line within the spending limit). To call such coercive

> conduct by any other name does not diminish the effect upon the candidate's choice. The issue is whether a candidate's decision to exercise her constitutional right to free speech has been chilled.

101 F.3d at 1560-61 & n.20 (Lay, J., dissenting). This reasoning, persuasive even as to public financing schemes conferring benefits upon participating candidates, applies *a fortiori* to Section 319, which provides no incentive or countervailing benefit to candidates who abandon their rights but rather only penalties to those retaining their full right to unlimited self-financed political expression. Section 319 burdens the political speech of self-financed candidates, and therefore must be narrowly tailored to serve a compelling governmental interest to survive constitutional scrutiny. *Austin*, 494 U.S. at 657.

B. Section 319's Burden on Self-Financed Political Speech Serves No Compelling Governmental Interest.

1. Section 319 Does Not Serve, and Indeed Undermines, a Governmental Interest in Preventing Corruption or the Appearance of Corruption.

In *Buckley*, the Court held the governmental interest in limiting "the actuality and appearance of corruption resulting from large individual financial contributions" a "constitutionally sufficient justification" for FECA's $1,000 contribution limit. 424 U.S. at 26. The Court further explained that the

particular corruption constituting that government interest was *quid pro quo* corruption, noting that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. *See also FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985) (explaining that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."); *Wis. Right to Life*, 127 S. Ct. at 2672 (holding that the advertisements at issue "are by no means equivalent to contributions, and the *quid pro quo* corruption interest cannot justify regulating them.").

The *Buckley* Court went on to clarify that the "appearance of corruption" justification is similarly related to *quid pro quo* arrangements, explaining that "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. This Court since has reiterated "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for

restricting campaign finances." *Nat'l Conservative PAC*, 470 U.S. at 496-97.[2]

Section 319 does not prevent corruption or the appearance of corruption because there is a complete "absence of any threat of corruption" from "a candidate's expenditure of his own funds," for which there can be no *quid pro quo*. *Buckley*, 424 U.S. at 53 n.59. In *Buckley*, the Court squarely rejected the argument that a limitation on a candidate's expenditure of personal funds served the interest in preventing corruption or the appearance of corruption:

> The primary governmental interest served by the Act the prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself[.]"

Id. at 53 (internal citation omitted).

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[2] The Court has recognized a variation on this interest specific only to "the unique state-conferred corporate structure," a variation clearly inapplicable to Section 319's burdens on individual candidates. *See Austin*, 494 U.S. at 660 (emphasizing that the interest recognized was not applicable to the mere accumulation of large amounts of wealth, but rather only to "the unique state-conferred corporate structure that facilitates the amassing of large treasuries[.]").

To the contrary, limiting or chilling a candidate's use of her own personal funds for political speech actually undermines the governmental interest in preventing corruption, as the "use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed." *Id.* Indeed, Section 319 undermines that interest not only by deterring potential self-financing candidates from reducing their dependence on outside contributions, but also by increasing the size and availability of outside contributions to a self-financer's opponent through increased contribution limits and coordinated party expenditure limits. Section 319's burdens on protected political expression therefore cannot be justified as serving a governmental interest in preventing corruption or the appearance of corruption.

2. Leveling the Playing Field Is Not a Compelling Governmental Interest.

In *Buckley*, this Court rejected the proposed "ancillary interest in equalizing the relative financial resources of candidates competing for elective office" as "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights." *Id.* at 54; *cf. Colo. Republican Campaign Comm.*, 518 U.S. at 609 (in its original form, prior to *Buckley*, FECA "sought both to remedy the appearance of a corrupt political process (one in which large contributions seemed to buy legislative votes) and to level the electoral playing field by reducing campaign costs."). Rejecting the "level playing field" rationale, the *Buckley* Court explained:

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

424 U.S. at 48-49 (internal quotations and citations omitted). *See also Austin*, 494 U.S. at 705 (Kennedy, J., dissenting) ("[T]he notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment.") (citing *Buckley*, 424 U.S. at 48-49); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."); *McConnell*, 540 U.S. at 227 (citing *Buckley*, 424 U.S. at 48-49, for its rejection of asserted governmental interest in equalizing the relative abilities of speakers to justify a burden on speech).

Specifically with respect to candidates' expenditures from personal funds, this Court held that equalizing candidates' relative financial resources was "fundamentally" an insufficient

government interest as "the First Amendment simply cannot tolerate ... restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. In addition to rejecting "leveling the playing field" as a compelling government interest, the Court further noted that limiting expenditures from a candidate's personal funds does not even serve that rejected interest because a candidate relying on self-financing easily may be outspent by an opposing candidate relying on outside contributions, and in fact reliance on personal funds may even exacerbate that disparity. *Id.* ("Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign.").

Ignoring this Court's clear rejection of the relative "enhancement" interest in *Buckley*, the district court nevertheless held that Section 319 "accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace" and reduces disparities "by 'leveling the playing-field' between candidates who are able to spend large amounts of personal wealth on their campaigns and those who cannot." *Davis*, 501 F. Supp. 2d at 29-31. The district court stands alone in this rejection of *Buckley*'s holding. *See, e.g.*, *Maupin*, 71 F.3d at 1426 ("The state's interest in maintaining individual participation is what the District Court correctly described as an effort to 'level the playing field between the rich and the poor.' The Supreme Court in *Buckley*, however, specifically held that the government may not 'restrict the speech of some

elements of our society in order to enhance the relative voice of others,' and no subsequent decision of the Court has undermined that holding.") (citations omitted); *Kruse v. City of Cincinnati*, 142 F.3d 907, 917 (6th Cir. 1998) ("These arguments, all concerning or stemming from the notion that the government has an interest in eliminating the advantage of wealth in the electoral process, or 'leveling the playing field,' are directly rebutted by Buckley[.]") (citation omitted); *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307, 317 n.10 (6th Cir. 1998) ("To the extent that this is an effort to 'level the playing field' and enhance the voice of other less organized or less affluent segments of society . . . relative to that of unions and corporations, it is impermissible.").

In a further departure from *Buckley*, the district court cites *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) in support of its 'relative enhancement' conclusion. *Davis*, 501 F. Supp. 2d at 29. In *Red Lion*, this Court upheld portions of the FCC's now-defunct "fairness doctrine," which required licensees of scarce public broadcast frequencies to cover both sides of controversial public issues. 395 U.S. at 400-01. In *Buckley*, however, this Court specifically rejected *Red Lion* as support for the very position advanced by the district court, finding that "[n]either the voting rights cases nor the Court's [*Red Lion*] decision upholding the Federal Communication Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." 424 U.S. at 49 n.55.

Distinguishing *Red Lion* as limited to broadcast media licenses, which "pose unique and special problems not present in the traditional free speech case," this Court concluded that "Red Lion therefore undercuts appellees' claim that [FECA]'s limitations may permissibly restrict the First Amendment rights of individuals in this 'traditional free speech case.'" *Id.* Therefore, *Buckley* directly rebuts the district court's asserted "leveling the playing-field" interest and its supporting citation to *Red Lion*. The desire to equalize relative financial resources of candidates for public office is not a compelling governmental interest and cannot justify the burdens Section 319 imposes on constitutionally protected political speech.

II. Section 319's Compelled Disclosure Provisions Unconstitutionally Infringe First Amendment Rights.

In addition to its penalizing and chilling burden discussed above, Section 319 further burdens First Amendment freedoms of speech and association through its imposition of compelled disclosure requirements, including exposure to personal civil and criminal liability for the candidate forced to disclose. *See Buckley*, 424 U.S. at 64 ("But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."). Those additional burdens, specific to compelled disclosure, subject Section 319 to strict scrutiny to determine whether it is "narrowly tailored to serve a compelling state interest." *Austin*, 494 U.S. at 657; *see also Buckley*, 424 U.S. at 64-65 (holding "that significant encroachments on First Amendment rights of the

sort that compelled disclosure imposes . . . must survive exacting scrutiny.").

A. Section 319's Disclosure Requirements, With Attendant Personal Civil and Criminal Liability, Burden the Exercise of First Amendment Freedoms of Speech and Association.

The district court rejected the argument "that the new and added disclosure requirements on self-financed candidates created by the Millionaires' Amendment burden [Petitioner's] First Amendment right to participate freely in political activities." *Davis*, 501 F. Supp. 2d at 32. Noting that "[t]he Supreme Court has consistently upheld against First Amendment challenges statutes that impose the burden of reporting campaign finance fundraising and expenditures no less onerous than those that trouble Davis[,]" the district court misconstrued the holdings in *Buckley* and *McConnell* as "illustrat[ing]" that Section 319's "reporting provisions do not in fact burden First Amendment speech rights." *Id.* at 32-33 (emphasis added).

In *Buckley* and *McConnell*, however, this Court held that the compelled disclosure provisions at issue did burden speech or associational rights, but the provisions survived strict scrutiny because they were justified by compelling governmental interests. *See Buckley*, 424 U.S. at 66 (holding that three categories of governmental interests served by FECA's disclosure requirements were "sufficiently important to outweigh the possibility of infringement" upon the exercise of First Amendment rights); *McConnell*, 540 U.S. at 196 (holding "that

the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full to BCRA."). In fact, the district court contradicts its conclusion that Section 319's reporting provisions do not burden protected speech rights not only by acknowledging that the statutes challenged in *Buckley* and *McConnell* "impose the burden of reporting," but also by previously finding that "[t]hese additional disclosure requirements impose an injury-in-fact on self-financed candidates" sufficient for Petitioner to have standing. *Davis*, 501 F. Supp. 2d at 27, 32.

At the outset, Section 319's disclosure requirements burden the exercise of protected speech by imposing new reporting obligations based solely on a candidate's decision to exercise what this Court found in *Buckley* to be a First Amendment right "of particular importance." 424 U.S. at 52 & n.58, 53 (describing a candidate's right to make expenditures from personal funds "in furtherance of his own candidacy" that "directly facilitates his own political speech"). Those reporting burdens include filing amended FEC Form 2, FEC Form 3Z-1, and most notably the disclosure of additional information in FEC Form 10 within twenty-four hours of each expenditure greater than $10,000 from personal funds upon exceeding the $350,000 triggering threshold. *See* 2 U.S.C. § 441a-1(b)(1); *see also* 11 CFR §§ 101.1(a); 104.19; 400.20(a), (b)(2); 400.21(b); 400.22; 400.24.

Not only do these provisions impose self-evident mechanical calculation and reporting burdens upon the exercise of protected self-financed political speech, but the requirement to provide FEC Form 10

to one's opponent within twenty-four hours of each qualifying personal expenditure inevitably signals certain elements of a self-financing candidate's political strategy to her opponent in ways not previously required, conferring a competitive advantage upon the opponent that chills and deters the exercise of First Amendment rights to unfettered self-financed political speech. *See Bellotti*, 435 U.S. at 785-86 ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."); *Rosenstiel*, 101 F.3d at 1562 n.25 (Lay, J., dissenting) ("A candidate's interest in speaking is in winning the election in which she is running; her speech will clearly be chilled if, by speaking she advances the campaign of her opponent."); *Day*, 34 F.3d at 1360 ("This 'self-censorship' ... is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.").

However slight the district court may have perceived the reporting burdens, Section 319's additional disclosure requirements also carry significant civil and criminal liability, personal to the candidate. *See* 2 U.S.C. §§ 441a-1(b)(3), 437g. *See also* FEC Matter Under Review 5648 (Broyhill), Second General Counsel's Rep. at 9 (Mar. 1, 2006) ("The 'Millionaire's Amendment,' unlike other [federal campaign finance] statutes, specifically assigns responsibility for compliance with its reporting requirements to the candidate."). Accordingly, a candidate who does not properly comply with Section 319's reporting requirements, triggered solely by the exercise of protected self-

financed political speech on behalf of one's own candidacy, is personally subject to civil penalties of up to two hundred percent of the expenditure involved, *see* 2 U.S.C. § 437g(a)(5)(B), (6)(C), and criminal penalties of up to $250,000 in fines and five years imprisonment. *See* 2 U.S.C. § 437g(d)(1)(A)(i); 18 U.S.C. §§ 3551(b)(2), (b)(3), 3571(b)(3).

This significant civil and criminal liability, overlooked by the district court, burdens First Amendment rights by chilling protected speech. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654, 668 (2003) ("[A] threat of a civil action, like the threat of a criminal action, can chill speech.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964)); *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (noting "deterrent effect" whereby "criminal sanctions may well cause speakers to remain silent rather than communicate" at the risk of prosecution); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (noting "that a threat of criminal or civil sanctions after publication 'chills' speech"); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions ... [has a] chilling effect on protected expression."). *See also Wis. Right to Life*, 127 S. Ct. at 2666 (noting potential for "chilling speech through the threat of burdensome litigation.") (citing *Hicks*, 539 U.S. at 119). Section 319 thus burdens the exercise of protected self-financed campaign speech.

In addition to the burdens on protected speech, "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64 (citations omitted). "[A] corollary of the right to

associate is the right not to associate." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("'[F]reedom of association . . . plainly presupposes a freedom not to associate.'") (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Section 319's compelled disclosure provisions infringe on a candidate's right not to associate with campaign contributors by instead self-financing his campaign. *See Buckley*, 424 U.S. at 53 ("Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."). By forcing a self-financing candidate to disclose regularly the nature and extent of his association or disassociation, with attendant civil and criminal liability for misreporting, Section 319 makes it more difficult for a candidate to eschew outside contributors and thus burdens his right not to associate.

B. Section 319's Burdensome Disclosure Provisions Serve No Compelling Governmental Interest.

The governmental interests recognized by this Court as "sufficiently important" to vindicate compelled disclosure requirements "fall into three categories," *Buckley*, 424 U.S. at 66, summarized as "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive . . . restrictions[.]" *McConnell*, 540

U.S. at 196. Section 319's disclosure requirements serve none of these interests.

1. Section 319 Does Not Provide the Electorate Additional Information or Data Beyond That Already Required to be Disclosed Elsewhere.

The first of the three recognized interests is in "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67 (internal quotation omitted). By providing such information, disclosures "allow[] voters to place each candidate in the political spectrum" and "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 67. Similarly, another recognized "informational" interest is providing "an essential means of gathering the data necessary to detect violations" of substantive federal campaign finance restrictions. *Id.* at 67-68.

Section 319's disclosure requirements do not serve either of the informational interests because, as the district court recognized, "all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not the Millionaires' Amendment ever applies[.]" *Davis*, 501 F. Supp. 2d at 32; *see also* 2 U.S.C. § 434(a)(2). Instead, Section 319's disclosures, which are expedited but ultimately redundant, merely enable the candidate's opponent to calculate the extent to which she can utilize

increased contribution limits, which serves only the illegitimate "interest in equalizing the relative financial resources of candidates competing for elective office[.]" *Buckley*, 424 U.S. at 54; *see also* Section I.B.2., *supra*. The informational interests are inapplicable and cannot justify Section 319's compelled disclosure burdens.

2. Section 319's Disclosure Requirements Do Not Prevent Corruption or the Appearance of Corruption.

The final recognized interest, listed second in *Buckley*, is to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. Disclosure serves this interest if it "may discourage those who would use money for improper purposes" or "detect any post-election special favors that may be given in return." *Id.* As discussed in Section I.B.1., *supra*, however, this Court has held that there is an "absence of any threat of corruption" from "a candidate's expenditure of his own funds," for which there can be no *quid pro quo*. *Id.* at 53 n.59. Section 319's disclosure provisions, designed to enable an opposing candidate to calculate his OPFA and thereby receive increased contributions and increased coordinated party expenditures, cannot be upheld as serving a compelling government interest in deterring actual or apparent corruption.

CONCLUSION

For the reasons stated above, the Court should find BCRA § 319 facially unconstitutional and reverse the district court judgment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-320

In The
Supreme Court of the United States

JACK DAVIS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

STATEMENT

In examining whether the Millionaires' Amendment, BCRA § 319, 2 U.S.C. § 441a-1, abridged appellant's First Amendment rights, the court below focused exclusively upon the isolated action of the Millionaires' Amendment itself, ignoring the background restrictions already in place that interact with § 391

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

to create a differential burden on appellant's First Amendment rights.

For example, the court found no burden on appellant because § 319 did not prevent him from spending his own money or reduce the amount he could raise from others. App. at 8. Although viewing the section merely as providing a "benefit" to his opponent, that is a distinction without a difference as appellant is indeed prevented from raising money from others to the same degree as his opponent. The only concern considered by the court, however, was whether § 319 "chilled" his speech, not whether it restricted him to a greater extent than his opponent. App. 10.

The court below also failed to give adequate consideration to the different nature of the alleged government interests asserted in support of § 391, accepting uncritically that § 319 provided a remedy for the supposed problem of differential resources and a "dangerous" public perception. App. 16.

Such a narrow and uncritical consideration of the First Amendment injury and the alleged government interests led the court to underestimate the First Amendment implications of § 319.

SUMMARY OF ARGUMENT

1. To properly evaluate the First Amendment harms presented by this case, this Court should look to the interaction between § 319 and the existing contribution limits in BCRA. Appellant indeed faces a greater burden on his speech than his opponent because he must comply with lower contribution limits, which reduce his opportunity to raise funds for speech. Ignoring pre-existing limits as not part of the

relative burden imposed on appellant and focusing exclusively on any chill created by § 319 alone ignores the First Amendment harm from the existence of discriminatory burdens from existing limits or exemptions therefrom.

2. The interests asserted in this case do are a far stretch from the corruption interests recognized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and a considerable stretch even from the somewhat expanded interests applied by this Court in *McConnell* v. *FEC*, 540 U.S. 93 (2003). Alleged public perception of unfairness, or the talismanic invocation of the word corruption to misdescribe such supposed unfairness, does not create corruption where none exists. The interest in a supposedly "fair" allocation of speech between candidates does not concern corruption, is novel at best, and has been repeatedly and properly rejected by this Court as a basis for regulating speech.

Section 319's abandonment of the lower contribution limits as unnecessary to prevent corruption when an opponent is self-financed also undermines the legitimacy of the lower contribution limits in total. Having found the marginal benefits from lower limits to be outweighed by the minor or invalid interests supporting § 319, they can no longer be relied upon to support the lower limits in other contexts and even as applied to the appellant and his opponent in this case.

In addition, the increased disclosure burdens in this case are not supported by the traditional justifications for disclosure, and are unjustified if the underlying interests supporting the differential contribution limits are invalid.

Finally, this Court should apply genuine strict scrutiny to this case because the interests alleged are novel and there is a significant likelihood that § 319 was designed and will operate to protect incumbents from those most capable of overcoming the advantages of incumbency by spending their own money as challengers

ARGUMENT

I. The Court Below Unduly Limited the First Amendment Injury It Was Willing to Consider.

In asking only whether § 319 would *chill* appellant's speech, the court below ignored the First Amendment harm resulting from the selective maintenance of the lower contribution limits on appellant while exempting his opponent from such limits. It is the differential burden of the remaining contribution limits that abridges appellant's rights, selectively burdening his ability to raise money for additional speech and more effectively to associate with others for expressive purposes simply because he has exercised his unquestioned First Amendment right to make personal expenditures for political speech. The operation of § 319, exempting appellant's opponent from pre-existing limits, is no different than if it had, *ab initio*, selectively imposed the lower limit on him but not his opponent. Such a discriminatory burden based on the exercise of protected First Amendment rights violates the First Amendment.

A. *Speaker Discrimination Is a Distinct First Amendment Injury Wholly Apart from Any Potential Chilling of Speech.*

It is hornbook First Amendment law that viewpoint or content discrimination infringes upon First Amendment rights and must be strictly scrutinized. For viewpoint discrimination, such scrutiny is generally fatal because the discrimination itself violates the First Amendment. For content discrimination, this Court has explained that, while not necessarily illegitimate in certain contexts, it is often highly suspect because it can act as a mask for viewpoint discrimination even when imposed by a nominally viewpoint-neutral law. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 387 (1992).

A corollary of such First Amendment anti-discrimination principles is that discrimination in the speech restrictions imposed upon different *speakers* also can be highly suspect. *See, e.g., Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional"). As with content discrimination, imposing differential restrictions on different categories of speakers raises the prospect that such discrimination is merely a mask for differentially restricting the viewpoints of one class of speaker or another.

In this case, § 319, in combination with the existing limits on contributions and coordinated party expenditures, creates a differential burden on speakers who choose to self-finance more than a limited amount of their political speech. Such speakers are

subject to lower contribution limits for their supporters, and more restricted coordinated spending from their parties than are their opponents.

This Court has, of course, recognized since *Buckley*, that contribution and coordinated expenditure restrictions impose a First Amendment burden, but has justified that burden by the interest in preventing corruption of the *quid pro quo* or undue influence sort – *i.e.*, the supposed ability of contributors or spenders to influence the candidate they have supported after he is elected. In this case, however, such burdens are not in the service of preventing corruption as described from *Buckley* to *McConnell*. Rather, they are claimed to serve quite different alleged interests that are not even remotely compelling. *See infra* Part II.

B. The More Restrictive Reporting Requirements Cause a First Amendment Injury.

In addition to the differential contribution and coordinated expenditure limits applied to self-financed candidates, the added reporting requirements for such candidates also burden their First Amendment rights. Unlike the usual candidate that relies upon contributions and spends little of his own money, a candidate that pays for more than a limited amount of his own speech must provide more frequent and immediate reports of his spending activity. Such reports are an added burden in and of themselves, and are not in the service of public information or enforcing any limits on their spending – the usual justifications for disclosure requirements – but rather serve the exclusive purpose of aiding the candidate's oppo-

nent in raising more money and in *avoiding* otherwise applicable limits.

Being forced to make immediate and frequent reports of expenditures for speech, merely because of the exercise of a protected right to self-finance that poses no risk of the supposed "corruption" claimed to justify campaign finance restrictions in the first place, is a burden on the freedom of speech. And to be forced to do so exclusively to benefit one's opponent smack's of government manipulation of the political marketplace in a manner that should raise grave skepticism by this Court. Whether such a burden on the freedom of speech actually "chills" self-financed speech is somewhat secondary to the fact that it penalizes constitutionally protected activities without a constitutionally valid justification. A discriminatory speech tax imposed on one side of a public debate, or on only one class of debaters, would violate the First Amendment regardless whether the tax were small or large and regardless whether it was actually effective at chilling the speech or speaker being taxed.[2]

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[2] Furthermore, the fact that the beneficiaries of § 391 also have added reporting requirements does not cure the discrimination here. Such beneficiaries are given benefits (the exemptions from otherwise applicable contribution limits) to go along with their added reporting burdens, while the targets of § 391 get no such benefits. Being "allowed" to exercise their protected right to self-fund their speech is not a benefit conferred by the government; it is a right protected by the Constitution. Government cannot exact a "price" for allowing that which it has no constitutional power to stop.

II. The Asserted Government Interest Is Novel and Invalid.

Once it is recognized that § 319, in combination with the existing restrictions imposed by BCRA, creates a First Amendment injury, the burden shifts to the government to establish a sufficiently important interest to justify that injury. This Court's precedent generally has limited such an interest to the prevention of the actuality or appearance of corruption. While this Court's conception of what constitutes "corruption" has admittedly (and, with regrets, improperly) expanded since *Buckley*, it has never expanded beyond the core notion of corruption as involving the exercise of improper influence by third parties over an actual or potential office-holder. *See, e.g.*, *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (government interest in preventing "'undue influence on an officeholder's judgment, and the appearance of such influence'" stemming from large campaign contributions) (citation omitted); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000) (interest in preventing "the broader threat from politicians too compliant with the wishes of large contributors"); *McConnell*, 540 U.S. at 144, 146 (interest in preventing the "the appearance of undue influence" and the alleged danger that large contribution beget "access to high-level government officials" and create an atmosphere of "debt").[3] "The hallmark of corruption is

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[3] This Court also has noted an interest in dampening the influence of certain entities deemed to have supposed "special advantages" of the corporate form "that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political mar-

the financial quid pro quo: dollars for political favors." BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1270 (1994).

A. *The Interest Here Is Not Related to Preventing Corruption or its Appearance, and Is Invalid.*

The alleged government interests in this case do not even come close to implicating even the fairly broad conception of corruption recognized by this Court. Rather, the interests are almost exclusively a faux-egalitarian concern with attempting to equalize the resources available to competing candidates, an interest that not only is not compelling, but that is in fact illegitimate on its face.

Congress and the court below, however, have sought to shoehorn the actual interests in this case into the "corruption" paradigm by claiming that § 391 combats a supposed public perception "that someone today who is wealthy enough can buy a seat" in Congress," which is supposedly akin to preventing the "appearance of corruption" recognized by this Court in the different context of third-party influence over elected officials. *See* 147 CONG. REC. at S3976 (March 21, 2001) (Sen. DeWine).

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ketplace," and in the prevention of corporations being used "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Beaumont*, 539 U.S. at 155 (citations and quotation marks omitted). *Amicus*, of course, disputes that rationale as a valid justification for restricting corporate speech, Brief of *Amici Curiae* Center for Competitive Politics, *et al.*, *Wisconsin Right to Life* v. *FEC*, No. 04-1581 (Nov. 14, 2005), but regardless of the validity of such an interest *per se*, no such "special" advantages are at issue here, and no possibility of circumventing contribution limits applicable to third parties.

More candidly, Congress also claimed a "fairness" interest in countering the supposed problem that uniform contribution limits "will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections." 148 CONG. REC. at S2142 (Mar. 20, 2002) (Sen. McCain); 147 CONG. REC. at S2451 (March 19, 2001) (Senator Domenici) (BCRA § 319 is intended to be "an equalizer amendment' * * * a fair play amendment; * * * a let's be considerate of a candidate who isn't rich amendment – whatever you choose to call it"); 147 CONG. REC. at S2461 (March 19, 2001) (Senator Durbin) (Amendment is a way to "make certain [Senators] have a level playing field" and thus ensure "fairness in * * * basic election campaigns").

Neither interest, however, can be warped, stretched, or tortured to fit within this Court's admittedly broad definition of preventing corruption.[4]

Regarding the first claimed interest in preventing the "appearance" of corruption, merely applying the epithet of "corruption" to the exercise of the right to expend one's own funds on political speech does not make it so. Regardless whether some might think it unfair that a wealthier candidate may have and exer-

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[4] *Amicus* agrees with Justice Kennedy that the Court would be wise to narrow its unwieldy definition of corruption. Restrictions on First Amendment activity should be valid "only if [a statute] regulates conduct posing a demonstrable quid pro quo danger." *McConnell*, 540 U.S. at 292 (Kennedy, J., dissenting). The unprincipled expansion of the corruption interest to include every possible situation where influence peddling is possible or appears possible has emboldened Congress to the point that it, in this case, argues that the unequal exercise of political speech is somehow corrupting.

cise greater means of engaging in political speech than his opponent, such means do not create any indebtedness to, or undue influence by, campaign contributors given that the money does not come from contributors. And the notion that such a candidate will be indebted to himself borders on the ridiculous. Running for (and attaining) elective office generally is a financial negative for a wealthy candidate that forgoes the opportunity to continue to make more money in the private sector. Such candidate cannot be said to be likely to provide valuable political favors to himself, and is decidedly less likely to do so than a candidate that lacks wealth to begin with and thus may be more motivated to take advantage of the temptations of elective office.[5]

As for the supposed public perception that there is something corrupt about wealthy individuals using their own money to fund an election campaign, that interest too is a far cry from the usual theories of corruption that turn upon a candidate being beholden to or solicitous of third-party contributors or supporters.

While there is no doubt that money buys speech, and that speech, if persuasive, helps a candidate get elected, a candidate relying on extensive contributions from third parties is no less "buying" speech (and hence presumably the election, in the government's condescending view of the public as sheep who react favorably to any speech, regardless of content or merit) than is the self-financed candidate. To suggest

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[5] And, of course, ethics and conflict of interest laws already penalize any attempt to misuse elective office for personal gain, as the spate of bribery prosecutions in recent years has made apparent.

that all money in politics – even a candidate's own money used only for speech – is corrupting is to radically depart from the notion of policing large contributions by third parties, and would eliminate virtually any possibility of "freedom" of speech in a world where "effective political speech" necessarily costs money. *See Buckley*, 424 U.S. at 19.

In addition, even if the public wrongly perceived self-financing as corrupt, such public misconception or "corruption" should not be sufficient to establish a constitutionally meaningful appearance of corruption. Particularly where there is no evidence of and no link to actual corruption, the proper response to such opinion is to correct the misperception, not to restrict speech. Otherwise, were mere public opinion enough to justify overriding the First Amendment, it would effectively eviscerate the very purpose of a Bill of Rights, which "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

As for the second interest in supposed fairness for the candidate unable or unwilling to spend significant personal resources on an election campaign, that interest does not even purport to involve corruption as understood by this Court. Rather, the theory underlying the claimed "fairness" interest is ultimately the false equation between speech and voting, and the attempt to map the one-person-one-vote theory of voting rights onto First Amendment speech rights. Fairness, after all, presupposes a certain "fair" base-

line amount of relative speech from which a self-financed candidate purportedly deviates. Such a theory, and the assumption of a fair amount of relative speech as between political competitors, is entirely at odds with the First Amendment and takes a condescending and impermissible view of the public, though, not surprisingly, it has been touted by certain academics for years.[6]

This Court in *Buckley* correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). Both this Court as a whole and various of its justices, have continued to recognize the illegitimate nature of

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[6] *See* Strauss, *Corruption, Equality, and Campaign Finance*, 94 COLUM. L. REV. 1369 (1994) (analogizing efforts to equalize speech to "one person one vote" principle); Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) (arguing that "the market status quo" should not be allowed to set the baseline for the amount of speech a person should be allowed to fund); Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996 (arguing that citizens should be equal in their ability "to command the attention of others for their own candidates, interests and convictions"); Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance Reform*, 94 COLUM. L. REV. 1204 (1994) (arguing that "each eligible voter should receive the same amount of financial resources for the purposes of participating in electoral politics").

having the government seek to define and enforce a "fair" amount of speech or to adjust the relative voices of participants in the political marketplace. *See, e.g., McConnell*, 540 U.S. at 138 n. 40, 227 (rejecting deference for statute aimed creating equality in the "political marketplace."); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 704 (1990) (Kennedy, J. dissenting) ("The argument [that the expenditure of money to increase the quantity of political speech somehow fosters corruption] is flawed * * *. [I]t assumes that the government has a legitimate interest in equalizing the relative influence of speakers. [Similar arguments were] rejected in *Bellotti*."); *id.* at 679 (Scalia, J., dissenting) ("I dissent because that principle is contrary to our case law and incompatible with the absolute central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of the political debate."); *id* at 695 (Scalia, J., dissenting) (the claim that those who spend more money for speech will have greater influence on elections "is not an argument that our democratic traditions allow – neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be 'unduly' extensive (because they are rich) or 'unduly' persuasive (because they are movie stars) or 'unduly' respected (because they are clergymen). The premise of our system is that there is no such thing as too much speech – that the people are not foolish, but intelligent, and will separate the wheat from the chaff.").

Furthermore, the attempt to equalize the resources of competing candidates in this case is even

more suspect than in many past cases because the differential treatment applied to self-financed candidates and their opponents occurs despite the fact that the *claimed* justification for the underlying contribution and coordinated expenditure limits – the prospect or appearance of "corruption" from the undue influence over a candidate of large contributors – is actually *weaker* for a self-financed candidate than for his opponent. The non-self-financed opponent, after all, is presumably more dependant upon any contributions or coordinated expenditures than is a candidate with his own means of engaging in political speech, and will presumably be more grateful or indebted for such contributions or expenditures than would be the candidate that is not so dependant.

The discrimination in the application of BCRA's various limits thus not only selectively burdens a self-financed candidate, it does so in a manner that worsens, rather than mitigates, the supposed problem to which such limits were addressed. The apparent hypocrisy of Congress in adopting § 319 thus gives great weight to the suspicion that it is acting for improper ends in manipulating the resources available to different candidates.

In the end, any disparities in the ability or willingness of candidates to spend their own money on speech is not at all incompatible with our constitutional system. "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238,

257 (1986) ("*MCFL*").[7] Any supposed interest in trying to manipulate available resources in the service of some supposedly "fair" amount of relative political speech is simply a bottomless pit of temptation absent some coherent baseline of what amount of relative speech is proper; a baseline Congress is constitutionally disabled from declaring. *Cf.* Jaffe, McConnell *v.* FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 Cato Supreme Court Review 245, 295-96 (2004) (criticizing the notion of "undue" influence as lacking a baseline and allowing manipulation of the political process). Such a claimed interest is simply "too amorphous" or "indefinite[]" and has "no logical stopping point," making the interest non-compelling for constitutional purposes. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality) (lack of compelling interest for racial classifications).

B. The Millionaire Amendment Actually Undermines the Alleged Interest In Preventing Corruption that Underpins BCRA Generally.

In addition to failing to advance any interest in preventing corruption as defined by this Court, the

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[7] That this Court does not view mere disparities in political activity based on financial means to be corrupt can be seen in its refusal to consider the poor a "suspect" class. If mere economic disparities corrupted the political process, one would think the products of that corrupt process would receive heightened scrutiny. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). That they do not suggests the absence of meaningful "corruption" from different economic means of engaging in political speech and the lack of a compelling interest in ameliorating such differences in the amount of speech by different political actors.

higher limits allowed by § 319 actually undermine the supposed justification for the otherwise applicable lower limits, as applied to appellant and his opponent here, and to candidates in general. Congress' determination in § 391 that higher limits did not pose a meaningful risk of corruption or that the marginal added risk was less significant than its marginal or illegitimate interest in "fairness" and more speech, necessarily declares the limited or non-existent value of the corruption interest being served by the lower limits as compared to the higher ones. But if the added corruption risk supposedly solved by the lower limits is not enough to outweigh the dubious interests served by raising the limits in § 391, then it cannot possibly outweigh the recognized burden that lower limits place on the First Amendment rights of candidates and their supporters. In other words, if the higher contribution limits are sufficient to serve Congress' claimed interest in battling corruption here, any supposed gains to be had from the lower limits are not compelling as compared to the First Amendment rights at issue and the higher limits should be sufficient generally, not just for the opponents of self-financing candidates.

Indeed, even in the less-scrutinized context of commercial speech, this Court has recognized that exceptions to restrictions based on the alleged dangers of speech tend to weaken the alleged government interest and render the interest incapable of outweighing the First Amendment burden imposed. *See, e.g., Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regula-

tory scheme undermined asserted government interest).

When Congress' abandonment of the claimed need for lower limits in this case is coupled with the fact that the supposed problem of resource imbalance is largely one of its own making, the case for the lower contribution limits becomes even weaker. The problem of unfairness identified by Congress is said to stem from *Buckley*'s different treatment of contributions and expenditures, leading to greater restrictions on those who cannot finance their own campaigns. *See* 147 CONG. REC. S2537 (March 21, 2001) (Sen. Dewine) ("The *Buckley* decision has effectively created a substantial disadvantage for opposing candidates who must raise campaign funds under the current fundraising limitations."). In reality, it was not *Buckley* that created the problem, but rather Congress' decision to impose contribution limits in the first place that handicapped candidates by limiting the amount of money they could raise. The simple solution, of course, is to raise or eliminate such limits for all, thus leaving candidates free to raise funds for political speech either from themselves or their supporters.

At a minimum, because Congress has effectively determined that a $6900 limit does not pose a serious threat of corruption, it no longer has a constitutionally adequate justification for the lower limits applied to appellant or other candidates. If an incumbent legislator desperate to survive the onslaught of a millionaire challenger is not moved to alter his voting patterns by a $6900 contribution, then how is an incumbent who is not nearly so worried about retaining

his seat corrupted by a contribution of $2300? Just as "[s[tatutory interpretation is a holistic endeavor," turning on the relationship among different parts of a statute, *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988), so too is the evaluation of the government's interests underlying the various restrictions in BCRA. Having partially abandoned its corruption justification in raising the limits under § 319, Congress cannot credibly rely on that justification to support lower limits elsewhere in the statute. The moment Congress approved BCRA § 319's increased contribution limits as being adequate to further the government's interest in preventing *quid pro quo* corruption or its appearance, Congress also must have simultaneously found that BCRA's general individual contribution limit was impermissibly overbroad. If anything, Congress' decision to approve higher contribution limits is *prima facie* evidence that the everyday $2300 limit is not tailored to achieving a compelling government interest and that a large amount of First Amendment protected activity is restricted without justification.

If, as Appellant claims, BCRA § 319 adequately prevents the appearance of corruption or its appearance, as classically defined, then BCRA § 307's more stringent requirements must fall because they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964).

C. *The Interest in Added Disclosure Is Not Supported by the Interests Found Sufficient for Prior Disclosure Requirements.*

As appellant has pointed out, the added disclosure in this case places additional burdens on a self-financed candidate that do not exist for other candidates raising money through contributions. Those burdens are imposed exclusively in the service of the candidate's opponent, as a means of enabling that opponent to raise more money.

The court below defended those increased disclosure requirements as minimal in comparison to other disclosure requirements that previously have been upheld by this Court, and thus found no First Amendment infirmity. But previous disclosure requirements have been justified on the much different grounds of informing the public regarding who is supporting the candidate and what that supposedly says about the candidate's views and who the candidate might favor as an office-holder, and on the supposed utility of disclosure in enforcing the substantive limits imposed by other sections of the federal election laws. Such interests, however, are simply not present in the case of the self-financed candidate and are not advanced by the more onerous reporting requirements imposed by § 319.

For example, a self-financed candidate, by definition, cannot be "beholden" to himself in the way that he might supposedly be beholden to contributors. There are no third parties who would expect favors from the candidate based on self-financing, and to the extent that a self-financed candidate might be suspected of posing a greater risk of self-dealing – to cre-

ate a return on his investment in himself – the existing disclosure requirements are more than ample to address that speculative risk. Indeed, such self-dealing poses a uniform risk for any candidate who might see elective office as a means of personal financial gain, and one would logically expect such a risk to be greater for the *poor* candidate rather than for the candidate that was already wealthy enough to devote considerable personal resources to his own election campaign. In any event, the existing disclosure requirements applicable to all candidates fully serve any interest in informing the public, and the added disclosure obligations do not further that interest in any greater manner.

As for the utility of disclosures in aiding the enforcement of contribution and other limits, once again, such an interest has nothing to do with reporting personal expenditures given that such expenditures are not limited at all, and hence there is nothing to enforce regarding such limits. The only thing the disclosure serves to "enforce" is the removal of limits on the candidate's opponent, a distinctly different interest that goes to issues of purported equality or competition, not to the underlying corruption concerns justifying enforcement of other limits.

In the end, therefore, this Court's past cases on disclosure offer no support whatsoever for the additional disclosure requirements currently being considered. Those new disclosure requirements can be justified, if at all, only on the same basis as § 319 as a whole – the faux egalitarian interest in equalizing the resources available to candidates and the supposed public concern that wealthy candidates can "buy"

elective office by spending their own money. If those interests are insufficient to support the substantive disparities in spending limits, they likewise are insufficient to support the added disclosure obligations.

D. At a Minimum, the Novel Interest Asserted here Should Trigger Genuine Strict Scrutiny.

Finally, even if this Court were to accept the possibility that the interests asserted by the government in support of § 319 were sufficiently important that they might support some abridgement of First Amendment rights, the interests are so novel that this Court should apply genuine strict scrutiny when considering whether § 319 furthers those interests and is narrowly tailored to achieving those interests. The more lenient scrutiny previously applied to contribution limits purportedly serving an anti-corruption interest have no place at all in considering the novel ends and means of the Millionaires' Amendment.

This Court's past deferential approach to Congress' assessment of the dangers of corruption has turned on what it viewed as the established acceptance of the traditional corruption rationale and the supposed expertise of Congress in assessing the danger involved. But this Court has recognized that scrutiny can be increased as well, where the alleged harm is not so well-accepted. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. Scrutiny likewise increases where there is a danger of particular "constitutional evils as, say, permitting incumbents to insulate

themselves from effective electoral challenge" were not present. *Id.* at 402 (Breyer, J., concurring). This case is one in which the interests asserted are novel and implausible, and the danger of self-interested legislation by Congress is high.

To date, the only established "non-novel" government interests recognized by this Court in analyzing the constitutionality of campaign contribution limits are the interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 208 (1982); *see also McConnell*, 540 U.S. at 291 (Kennedy J., dissenting). As discussed above, the interests alleged in this case are not of the traditional corruption sort, and are, at a minimum, novel, if not outright illegitimate.

The danger of self-protective legislation is also pronounced here. As a general matter, there is reason to suspect Congress whenever it seeks to manipulate the balance of political debate or regulate campaign finance. *See Austin*, 494 U.S. at 692 (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things – even some seemingly *desirable* things – that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."); *id.* at 692-93 ("with evenly balanced speech, incumbent officeholders gen-

erally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech 'for fairness' sake' simply out of bounds.").[8]

Furthermore, beyond general principle, the danger that § 319 would favor incumbents was expressly recognized by various members of Congress. *See* 147 CONG. REC. at S2544 (March 21, 2001) (Sen. Daschle) ("In my state of South Dakota, if my opponent wanted to spend over $686,000 of their own money, I could take advantage of the new limits even if I might have $5 in the bank myself. If the same forces that want to pass this amendment turn around and triple the underlying contribution limits, I would be able to go out and raise as much as $18,000 from every individual who wants to contribute to my campaign. How is that

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[8] *See also* Klarman, *Majoritarian Judicial Review: Entrenchment Problems*, 85 GEO. L.J. 491, 536-537 (1997) ("The one thing that virtually all commentators agree upon is that legislators drafting campaign finance legislation will seek to enhance the advantages of incumbency."); BeVier, 94 COLUM. L. REV. at 1279 ("a premise of distrust of campaign finance reform laws is warranted in principle on account of the context of such legislation.[] Such legislation carries significant potential to achieve incumbent protection instead of enhancing political competition. It arouses the uncomfortable suspicion that the corruption-prevention banner is an all-too-convenient subterfuge for the deliberate pursuit of less savory or less legitimate goals.") (footnote omitted); BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1080 (1985) ("contribution limitations 'impose far more serious strictures on challengers than on incumbents. * * * Research strongly suggests that anything that makes it harder to raise funds will be detrimental to challengers and correspondingly strengthen the position of incumbents.[]") (footnotes omitted).

fair? * * * Just because I might have a wealthy opponent, should I be allowed to open up the floodgates here and take whatever money I can raise? How is that limiting the influence of money? No, instead this protects incumbents."); 147 CONG. REC. at S3195 (March 30, 2001) (Sen. Dodd) (expressing concern that exempting an incumbent's war chest from the gross receipts advantage formula would create "a substantial loophole for incumbents"); 147 CONG. REC. at S2548 (March 21, 2001) (Sen. Levin) (expressing concern that "the incumbent who already has the financial advantage and the incumbency advantage is * * * also given the advantage of having the higher contribution limits"). As Senators with ample experience raising money and waging electoral campaigns, these three Senators immediately recognized what BCRA § 319 would mean for well-connected incumbents like themselves.

Such added benefits to incumbents, of course, are in addition to the recognized benefits that already attach to incumbency, and which have occasioned little concern from Congress regarding fairness for their potential challengers. *Cf. Randall v. Sorrell*, 548 U.S. 230, --, 126 S. Ct. 2479, 2496 (2006) (plurality opinion) (acknowledging the existence of a "name recognition advantage enjoyed by the incumbent."); *Shrink*, 528 U.S. at 403-404 (Breyer, J., concurring) (Court cannot defer to the legislature when a statute "significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from electoral challenges").

While the FEC claims that such incumbent-protection concerns are not supported by the evidence

because few incumbents have benefited from § 319, Appellee Motion to Dismiss or Affirm at 23-24 (only six incumbents invoked the rule in four years), its data does not actually go to the issue. Of the non-incumbent candidates that invoked the rule, there is no indication how many of them were facing an incumbent opponent and how many were in a race for an open seat with no incumbent. Given the fund-raising advantage of incumbents, it would be no surprise that few if any of them felt the need to expend their own resources and thus trigger § 319 for the benefit of their poorer opponent. Furthermore, the data says nothing about how many challengers to incumbents were deterred from spending large amounts of personal money against an incumbent, and thereby enhancing the natural advantages of incumbency even further.

More telling is the use of self-financing to challenge incumbents *before* § 319 went into effect. A data analysis performed by political scientist Jennifer Steen shows that "The Millionaire's Amendment would have benefited an incumbent member of Congress in 40% of all general elections in which it was relevant in the 2000 election." Jennifer Steen, *Life After Reform: When The Bipartisan Campaign Reform Act Meets Politics* 13 (Roman and Littlefield 2003).

Finally, there is no reason to think that Congress has any particular expertise on the supposed public perception regarding self-financed candidates. While Congressmen may have expertise on the effects of large contributions on elected officials – an indictment of their own conduct as such officials more than

anything else – their claim to know that the public finds their opponents more corrupt than them is disingenuous at best.

Because the government's interests in this case are novel, at best, and raise genuine concerns that § 319 is designed to insulate incumbents from a category of challengers that might be able to overcome the advantages of incumbency, this Court should apply genuine strict scrutiny in this case.

CONCLUSION

For the reasons above, this Court should reverse the judgment of the District Court for the District of Columbia with regard to the added disclosure requirements imposed by § 319, and should either endorse § 319's higher limit as applicable to both candidates or, as an interim measure, strike down the one-sided increase in the contribution limit as impermissibly discriminatory and remand the case back to the FEC for a potential challenge by Davis's opponent to the application of the usual lower limits insofar as the government interest purportedly justifying such lower limits is demonstrably insufficient or non-existent in light of § 319's acceptance of a higher limit as being non-corrupting.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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3-26-08

No. 07-320

IN THE

Supreme Court of the United States

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

Common Cause is a non-profit, non-partisan citizens' organization with approximately 300,000 members and supporters nationwide. Founded in 1970, Common Cause has long supported efforts to improve this nation's campaign finance laws at the national, state, and local levels. In particular, Common Cause was a key proponent of the Bipartisan Campaign Reform Act ("BCRA") and has filed amicus curiae briefs supporting the constitutionality of BCRA in previous cases.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

Jack Davis brought this action challenging Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") after he failed to comply with the statute's reporting requirements in his 2004 House campaign. Davis contends the statute deters him from doing that which he has already done twice since Section 319's enactment: self-finance a campaign against an incumbent officeholder.

The three-judge district court correctly held that Section 319 does not restrict or chill speech. *Davis v. Fed. Election Comm'n*, 501 F.Supp.2d 22, 29-33 (D.D.C. 2007). To the contrary, the statute promotes political discourse: It leaves all candidates free to spend unlimited amounts of their own money on their campaigns, while relaxing contribution and coordinated expenditure limits for opponents of self-financed candidates in narrowly-defined circumstances. Thus, it restricts no one's speech, while encouraging more candidates to run for office and enhancing candidates' ability to communicate.

While Section 319 does not burden speech, it does further well-established and substantial government interests. Congress enacted the statute to address concerns that self-financed candidates were deterring qualified challengers of modest means from running for office, while political parties were increasingly recruiting candidates based on their personal wealth. By raising contribution and coordinated-expenditure limits for opponents of self-financed candidates, Section 319 increases the likelihood that qualified candidates who lack personal wealth will run for office. It thereby furthers First Amendment values by enlarging the pool of candidates from which the electorate can choose, combating the growing

perception that only the wealthy can run for office, and promoting competitive elections.

Congress carefully tailored Section 319 to accomplish these goals. For example, to avoid advantaging incumbents, the formula for determining eligibility for the higher contribution limits accounts for fundraising in the year prior to election year. Furthermore, the higher contribution limits end if and when funds raised under the higher limits offset the self-financed candidate's advantage.

There is no evidence that the statute in practice has deterred candidates like Davis from self-financing challenges to incumbents. In fact, the number of candidates willing to self-finance challenges has not declined and may even have increased since Section 319 took effect.

The 24-hour reporting requirements in Section 319 are also constitutional. This Court upheld a separate BCRA disclosure provision that required 24-hour reporting in *McConnell v. Federal Election Commission*, 540 U.S. 93, 194-202 (2003). And, while most states require some form of 24 or 48-hour reporting of expenditures, there is no evidence that these disclosure laws have chilled political speech.

Because Section 319 does not burden speech but rather advances important government interests, *Amicus* respectfully submits that the Court should affirm the judgment below.

ARGUMENT

I. CONGRESS ADOPTED SECTION 319 TO ENCOURAGE GREATER PARTICIPATION BY CANDIDATES OF MODEST MEANS.

The three-judge district court determined that Davis's challenge to Section 319 "fails at the outset because [the statute] does not 'burden[] the exercise of political speech.'" 501 F.Supp.2d at 28-29 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990)). That court therefore had no occasion to consider the sufficiency of the interests that underlie Section 319. In fact, the interests that Congress sought to further through Section 319 are substantial and important.

Congress enacted Section 319 against the backdrop of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which struck down the Federal Election Campaign Act's limits on candidate expenditures but upheld the Act's contribution limits. *See Buckley*, 424 U.S. at 29, 54. While this Court recognized that the threat of corruption justified contribution limits, *id.* at 29-30, the decision in *Buckley* created a practical disparity between those of modest means and those who had the ability to self-finance. After *Buckley*, the fortunate few in the latter group had the guaranteed ability to attract unlimited donations from a single contributor—themselves—while those lacking wealth had to raise contributions in $1,000 increments. As Senator DeWine put it, "[e]very citizen in this country is limited to how much money he or she can contribute to a candidate for the Senate—every person in this country, except one. That one person is a candidate himself or herself." 147 CONG. REC. S2462 (daily ed. Mar. 19 2001).

This disparity undermined the electoral process in two ways. First, self-financed candidates were able to deter qualified opponents of modest means from running for office, particularly in primary elections. As Senator Collins pointed out, the presence of a wealthy candidate in the race "discourages a lot of otherwise very qualified people from even running for office in the first place." 147 CONG. REC. S2469 (daily ed. Mar. 19, 2001).

The existence of this deterrent effect finds support in the political science literature. One study of Congressional elections between 1992 and 2000 found that self-financed candidates had deterred 92 experienced candidates from running in potentially competitive House elections. JENNIFER A. STEEN, SELF-FINANCED CANDIDATES IN CONGRESSIONAL ELECTIONS 154 (2006). In those elections, this amounted to a 21-percent reduction in the number of experienced candidates running for office. *Id.*

Congress was likely aware of several high-profile cases where self-financed candidates had deterred qualified candidates of modest means from running for office. For example, Representative Frank Pallone Jr. publicly stated that he decided not to seek a New Jersey Senate seat because of the wealth of his potential opponent, Jon Corzine, the former Goldman Sachs CEO who ultimately spent $60 million on his campaign. *Id.* at 47. In the 1994 Republican primary for a California Senate seat, an incumbent congressmen, two former congressmen, and a former U.S. Senator decided not to enter the race after multi-millionaire Michael Huffington declared his candidacy. *Id.* In short, "anecdotal evidence clearly identifies instances in which Senate self-financers have either cleared the field, like Michael Huffington, or intimidated a potential rival, like Jon Corzine,

whose wealth deterred the congressman widely regarded as the strongest contender from entering a U.S. senate race." *Id.* at 90.

The second troubling effect of the disparity between self-financed candidates and their opponents was that political parties began recruiting candidates based on the size of their bank accounts. Senator McCain cited the fact that "both parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate." 147 CONG. REC. S2540 (daily ed. Mar. 20 2001). Indeed, newspaper reports confirm that the 2000 Chairman of the Democratic Congressional Campaign Committee was "systematically scouting for 'self-funders'" and even announced that "[m]y successors will employ similar strategies." Tom Hamburger, *Who Wants a Multimillionaire? Democrats, to Help Win Senate*, WALL ST. J., Oct. 19, 2000, at A28. "[W]e are moving down a road," said Senator DeWine, "where personal wealth is becoming the chief qualification for candidates seeking office." 147 CONG. REC. S2537 (daily ed. Mar. 20 2001).

Members of Congress reasonably concluded that this wealth test for candidates would erode the public's faith in democratic institutions. 148 CONG. REC. H430 (daily ed. Feb. 13, 2002) (Rep. Capito) ("The only way a pure American democracy can work is if people have faith in the system and if they participate. That includes running for office. It is time to recognize that the realities of today's elections prevent many from participating.").

Moreover, this increasingly prevalent recruitment standard would have excluded, based on personal wealth alone, the vast majority of Americans. In the 2000 elections that immediately preceded Congress's consideration of Section 319, the average House

candidate spent almost $850,000 on his or her campaign, nearly 10 times the median net worth of American families.[2]

By working to remedy the disparities that exist between candidates who have the resources to self-finance and those who do not, increasing the pool of eligible candidates, and promoting greater participation in House elections, Section 319 furthers Congressional interests of undeniable importance. For one, Section 319 "facilitat[es] and enlarg[es] public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. It thus "furthers, not abridges, pertinent First Amendment values." *Id.* at 93. It also combats the "patently exclusionary character" of a wealth requirement for office, which "'tends to deny some voters the opportunity to vote for a candidate of their choosing.'" *Bullock v. Carter*, 405 U.S. 134 (1972) (striking down a Texas filing fee requirement). And by targeting the perception that wealth is a prerequisite to running for Congress, Section 319 helps to "[p]reserv[e] . . . the individual citizen's confidence in government" and "sustain[] the

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[2] The Center for Responsive Politics, *The Big Picture: 2000 Cycle - The Price of Admission*, *available at* http://www.opensecrets.org/bigpicture/stats.asp?display=A&type=W&Cycle=2000 (last viewed Feb. 29, 2008) (stating that the average House candidate in 2000 spent $849,158); U.S. Census Bureau, Statistical Abstract of the United States: 2003, at p. 469, Table No. 709 (stating that the median household net worth in 2001 was $86,100). In 2000, only 8.1% of households had a net worth of $500,000 or more. U.S. Census Bureau, *Wealth and Asset Ownership: Asset Ownership of Households: 2000*, Table 4 - Percent Distribution of Household Net Worth, by Amount of Net Worth and Selected Characteristics: 2000, *available at* http://www.census.gov/hhes/www/wealth/1998_2000/wlth00-4.html.

active, alert responsibility of the individual citizen in a democracy," which are "interests of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (internal quotations omitted).

II. CONGRESS CAREFULLY TAILORED SECTION 319.

Congress deliberately tailored Section 319 to accomplish these important interests without deterring candidates from self-financing.

Section 319 arose out of a BCRA amendment introduced by Senator Domenici. The Domenici amendment would have lifted the contribution limits for the entirety of the campaign once an opponent spent more than a specified amount of personal funds. *See* 147 CONG. REC. S2449-2450 (daily ed. Mar. 19, 2001). Members of Congress, as well as organizations such as Common Cause, questioned the wisdom of the Domenici amendment. *See, e.g.*, Press Release, Statement of Common Cause President Harshbarger on "Millionaire's Amendment" to McCain-Feingold (Mar. 20, 2001) (on file with author).

To address these concerns, Congress narrowed the Domenici proposal in two key ways. First, Section 319 replaced the Domenici threshold approach with a system that raises the contribution and coordinated expenditure limits only if the *difference* between the two candidates' "expenditures from personal funds"—a measure known as the opposition personal funds amount ("OPFA")—exceeds $350,000. 2 U.S.C. § 441a-1(a)(1). In so doing, Congress strengthened the connection between the statutory remedy and the disparity Section 319 was designed to address.

Congress also sought to ensure that the statute did "not create incumbent advantage." 147 CONG. REC. S3192 (daily ed. Mar. 30, 2001) (statement of Sen. Durbin). Section 319 accounts for contributions that candidates receive in the year prior to the election, the period when one would expect an incumbent to have the most significant fundraising advantage over a challenger. Specifically, the calculation of "expenditures from personal funds" takes into account not only each candidate's personal expenditures, contributions, and loans, but also the "gross receipts advantage." 2 U.S.C. § 441a-1(a)(2)(B)(i). The gross receipts advantage is calculated by comparing 50 percent of each candidate's gross receipts from the year prior to the election. *Id.* § 441a-1(a)(2)(B)(ii).[3]

Congress further refined the Domenici proposal by having the contribution limits in Section 319 return to standard levels once the OPFA disparity no longer exists. After an opponent of a self-financed candidate raises 100 percent of the OPFA in Section 319 contributions, the opponent can no longer take advantage of the higher contribution limits. *Id.* §

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[3] *Amici* Gene DeRossett and J. Edgar Broyhill II charge that Section 319 is not narrowly tailored because it accounts for 50 percent of each candidate's pre-election year gross receipts, as opposed to 100 percent. *Amici* Brief at 31. They argue no difference exists between a dollar self-financed and a dollar raised. But in light of the costs of fundraising, Congress's decision to account for only 50 percent of the gross receipts was entirely reasonable. As Senator Durbin pointed out during the debate over the Senate version of the Millionaires' Amendment, "[i]t costs you 50 cents to raise a dollar, so about half of the money you raise goes into the overhead of a campaign, the administrative costs of staff people, mailing out invitations, following up, making sure people are there." 147 CONG. REC. S2539 (daily ed. Mar. 20, 2001).

441a-1(a)(3)(A)(ii). Thus, Congress tailored Section 319 to give candidates of modest means the *opportunity* to raise funds to *offset* the benefit of personal wealth. At the same time, the carefully-crafted statute protects a self-financed candidate from the possibility that his opponent will raise *more* under the higher contribution limits than the self-financing candidate has spent on his own campaign.

III. SECTION 319 DOES NOT BURDEN SPEECH.

Because of the way Congress structured Section 319, the statute does not restrict or deter candidates from self-financing. Section 319 leaves candidates free to engage in unlimited self-financing, and there is no evidence that the statute's variable contribution limits or reporting requirements deter speech.

A. Section 319 does not restrict the amount of money that self-financed candidates may spend.

Davis cannot find support for his constitutional challenge in *Buckley*, 424 U.S. 1. To the contrary, Section 319 is fully consistent with that decision. In *Buckley*, this Court struck down Section 608(a)(1) of the Federal Election Campaign Act, which placed direct limits on a candidate's personal expenditures. *Id.* at 51-54. Such direct expenditure limits, the Court held, "impose[] a substantial restraint on the ability of persons to engage in protected First Amendment expression." *Id.* at 52.

In contrast to the candidate-expenditure limits rejected in *Buckley*, Section 319 places no restriction on a candidate's self-financing. Candidates remain free to contribute unlimited amounts to their own campaigns. Likewise, Section 319 does not cap the amount that self-financed candidates may spend on

their campaigns. Section 319 thus falls outside the bounds of *Buckley*.

Davis and his supporting amici incorrectly read *Buckley* as prohibiting Congress from employing *any* means to address the disparity that exists between candidates who have the ability to self-finance and those who do not. *See, e.g.*, Appellant's Opening Brief at 24-25. That interpretation of *Buckley* is fundamentally flawed. In fact, in Section 319 Congress devised a means to promote political speech that is fully supported by *Buckley*.

The Court in *Buckley* did not, as has been suggested, hold that the governmental interest in "equalizing the relative financial resources of candidates," *id.* at 54, is insubstantial or illegitimate. Instead, the Court held that "the concept that government may *restrict the speech of some elements of our society* in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." 424 U.S. at 48-49 (addressing limits on independent expenditures) (emphasis added). Section 319 does *not* restrict the speech of some to enhance the voice of others; it merely provides a limited opportunity for "others" to enhance their own voices if they are able to garner additional support from contributors. Nowhere did the *Buckley* Court hold that it would be illegitimate or unconstitutional for Congress to attempt alternative means, such as Section 319, to enhance the voices of candidates who lack personal wealth *without* restricting anyone else's speech.

Consistent with this understanding, the Court in *Buckley* held only that the equality interest, however legitimate and substantial, was not "sufficient" to justify a direct "restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. The Court did

not address whether that same interest could serve, by itself or with other interests, to justify a law that promotes the ability of candidates to raise money for speech and that does not place any limit on anyone's ability to spend their own money on their campaigns. *See Buckley*, 424 U.S. at 53-54. Section 319 is such a law.

The constitutionality of Section 319 is supported by the *Buckley* Court's rationale for upholding the presidential public financing system. The Court upheld that system because it is "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation." *Id.* at 92-93. Section 319, like public financing (but without using tax dollars), "facilitates and enlarges public discussion and participation" without abridging, restricting or censoring anyone's speech.

B. Section 319 does not deter self-financed challengers.

There is a notable lack of evidence either in the record or in the public domain that Section 319 (or Section 304, the section specific to Senate campaigns) has deterred self-financed candidates from challenging incumbent officeholders. Davis himself self-financed two runs for office against an incumbent Congressman after Section 319 went into effect. *Davis*, 501 F.Supp.2d at 31. Thus, Davis cannot argue that the statute deterred him from self-financing.

Davis failed to submit any evidence to the trial court that Section 319 had deterred other challengers from self-financing. Indeed, publicly-available data indicates that the number of self-financed challengers has at least remained steady since Section 319's

passage, and may have even increased. According to Professor Jennifer Steen, in 2002, the last election before BCRA's enactment, 17 incumbent-challengers exceeded the self-financing thresholds in Section 319 and 304. Jennifer Steen, *Self-Financed Candidates and the "Millionaires' Amendment"*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 210 (Michael J. Malbin ed., 2006) ("ELECTION AFTER REFORM"). While Professor Steen reported a slight drop in the 2004 cycle (13 incumbent-challengers), likely for reasons entirely unrelated to Section 319,[4] FEC data indicates that the number of challengers who self-financed above BCRA's threshold rebounded to at least 17 in 2006 and may have even increased by 47 percent.[5]

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[4] The modest decrease in the number of incumbent-challengers who chose to self-finance in 2004 likely resulted from factors unrelated to BCRA. House elections in 2004 were generally uncompetitive due to a drop in the number of seats held by the "wrong" party (based on a comparison between the party holding the seat and the district-level presidential vote), partisan gerrymanders that had reduced the number of competitive seats up for grabs, the absence of a national surge favoring either party, and a polarized electorate. *See* Gary C. Jacobson, *The First Congressional Elections After BCRA*, *in* ELECTION AFTER REFORM 186-87.

[5] This uncertainty arises because it is unclear whether Professor Steen's 2004 and 2002 figures for the number of incumbent-challengers include challengers who self-financed in a primary with the potential of facing an incumbent in the general election. Steen, *Self-Financed Candidates and the Millionaires' Amendment*, *supra*, at 210. If we include these primary challengers, there were 25 candidates who self-financed in 2006, seven more than in 2002. If not, the number of self-financed challengers remained at seventeen in 2006.

To determine the number of challenger-incumbents who exceeded BCRA's thresholds in 2006, we searched for FEC Form 10's on the FEC's Report Image Search website for each candidate listed in two FEC publications—Official Election

Nor has BCRA given incumbents a significant advantage in defeating self-financed challengers. Of the 13 congressional incumbents who were challenged by self-financed candidates in 2004, eight were ineligible for higher limits because of their gross receipts advantage from off-year fundraising. Only one of the remaining five incumbents raised contributions under BCRA's higher limits. That incumbent received $134,950 under the higher limits, just one-fifteenth of his 2004-cycle receipts. Steen, *Self-Financed Candidates and the "Millionaires' Amendment,"* at 209, 217 n.7.

Of course, with Section 319 in effect, self-financed candidates may find it harder to scare off challengers or may more often have to face competitive opponents. But there is no right to speak "free from vigorous debate." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14-15 (1986). Thus, as the First Circuit stated in upholding a Maine statute that provided matching funds to candidates who chose to participate in the state's public financing system and who were targeted by independent expenditures, the First Amendment provides "no right to speak free from response." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). Rather, the First Amendment's purpose is to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley*, 424 U.S. at 49 (internal quotations omitted). Section 319 furthers that purpose.

Results for United States Senate: 2006 Senate Campaigns and Official Election Results for United States House of Representatives: 2006 House Campaigns—both of which can be found at http://www.fec.gov/pubrec/electionresults.shtml. We excluded candidates who filed Form 10, but whose expenditures did not exceed the threshold.

C. Section 319's reporting requirements do not burden or deter speech.

Section 319 contains three disclosure provisions that help implement the statute's variable contribution limits. First, the statute requires all candidates to file a declaration of intent stating the total amount of expenditures from personal funds that the candidate intends to make in excess of the $350,000 threshold. 2 U.S.C. § 441a-1(b)(1)(B). Second, a candidate must file an initial notification within 24 hours of exceeding this threshold. § 441a-1(b)(1)(C). Third, a candidate must file additional notifications within 24 hours each time he makes additional personal expenditures that in the aggregate exceed $10,000. § 441a-1(b)(1)(D).

There is neither evidence that these reporting provisions deter candidates from speaking nor any reason to believe that they would. The declaration of intent is but one line on FEC Form 2, which all candidates for Congress must file once they have received or spent more than $5,000. *See* 2 U.S.C. §§ 431(2), 432(e)(1); 11 C.F.R. §§ 101.1(a), 400.20. Regardless of whether a candidate intends to self-finance, he must complete the declaration. Moreover, the declaration provision requires only that a House candidate state the amount in excess of $350,000, if any, that he intends to expend from his personal funds. The candidate need not identify when or how the funds will be spent. *See* FEC Form 2: Statement of Candidacy (Feb. 2003), *available at* http://www.fec.gov/pdf/forms/fecfrm2.pdf.

Section 319's notification requirements are likewise modest. Upon exceeding the threshold or spending an additional $10,000, candidates must file FEC Form 10, a one-page form on which the candidate lists the aggregate personal expenditures previously

reported, the personal expenditures that triggered the notice, the total amount of personal expenditures disclosed in the notice, and the total personal expenditures in the election cycle to date. 11 C.F.R. §§ 400.21, 400.23, 400.24. For the disclosed personal expenditures, the candidate need only list the date, the amount, the election (primary, general, or other), and whether it was in the form of a loan. Importantly, the candidate need not identify the purpose of the expenditures or the payee. *See* FEC Form 10: 24-Hour Notice of Expenditure From Candidate's Personal Funds (Sept. 2005), *available at* http://www.fec.gov/pdf/forms/fecfrm10.pdf.

Furthermore, the information that must be reported on FEC Form 10 is the same information that candidates have to disclose anyway in their quarterly, pre-election, and post-election reports of receipts and disbursements. *See* FEC Form 3: Report of Receipts and Disbursements for an Authorized Committee (Feb. 2003), *available at* http://www.fec.gov/pdf/forms/fecfrm3.pdf. Section 319 simply requires the disclosure of this information at an earlier point in time.

It is settled that there is nothing unconstitutional about 24-hour reporting of campaign expenditures. In *McConnell*, this Court upheld Section 201 of BCRA, which requires 24-hour reporting of "electioneering communications" totaling more than $10,000 in a calendar year. 540 U.S. at 194-202. Section 201 requires filers to disclose significantly more information than Section 319. Section 201, for example, requires the filer to report the identity of any payee, the purpose of any independent expenditure, and the date the purchased communication will be broadcast, none of which is required under Section 319. *See* 2 U.S.C. §§ 434(f)(2),

441a-1(b)(1)(F) . Section 201 is thus less burdensome than another 24-hour reporting requirement that this Court has already sustained.

Davis's challenge to Section 319's 24-hour reporting provisions is further undercut by the fact that 33 states employ some form of 24 or 48-hour reporting as a component of their campaign finance disclosure laws.[6] There is no evidence that 24-hour reporting has deterred candidates or outside groups from participating in the political process in the states, where 24-hour reporting in some form is the norm, not the exception. In fact, experts on state disclosure laws have identified 24-hour reporting of late contributions and independent expenditures as critical provisions of any disclosure regime. *See* Campaign Disclosure Project, *Campaign Finance Disclosure Model Law* at viii-ix, 36-37 (June 2004), *available at* http://www.campaigndisclosure.org/modellaw/ModelDisclosureLaw.pdf.

Certain *amici* have tried to exaggerate the burden of Section 319's reporting requirements by suggesting, wrongly, that the FEC has censured a candidate for inaccurately predicting the amount of his personal expenditures. *See* Brief of Gene DeRossett and J. Edgar Broyhill II as *Amici Curiae* in Support of Appellant at 8 & n.6. *Amici* DeRosett and Broyhill cite the case of Mike Crotts, a House Candidate in 2004.

Contrary to *amici*'s suggestion, however, Crotts was fined for failing to file a timely declaration of intent, not for misstating how much he intended to spend.

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[6] *See* Campaign Disclosure Project, *Campaign Disclosure Law Database*, *available at* http://disclosure.law.ucla.edu. The 33 states with 24 or 48-reporting are listed in the appendix attached to this brief.

See In the Matter of Mike Crotts for Congress Committee, Inc., MUR: 5623 (FEC Jul. 13, 2005), Conciliation Agreement, *available at* http://eqs.nictusa.com/eqsdocs/000045A7.pdf. When Crotts filed his FEC Form 2, he left his declaration of intent blank, rather than inserting $0 or the amount in excess of $350,000 he intended to spend. *Id.* at 4 ¶ 8. Two months after the FEC Form 2 was due, Crotts filed an amended form stating that he intended to expend no personal funds in excess of the threshold amount. *Id.* After Crotts gave his campaign a $400,000 loan, he neglected to file his initial notification and did not file the notification until 47 days after it was due. *Id.* at 4-5 ¶¶ 9-10. Crotts likewise failed to file a required schedule for the disclosure of his loan. *Id.* ¶ 11. The conciliation agreement between Crotts and the FEC identified Crotts' violations as failing to file (1) a timely declaration of intent, (2) an initial notification, and (3) a schedule for the loan. *Id.* at 5 § V.1. The conciliation agreement did not in any way suggest that Crotts had violated Section 319 by inaccurately predicting his intended expenditures from personal funds.

DeRosett and Broyhill's attempt to characterize the fines they paid as a substantial First Amendment burden is even less persuasive. *See* DeRossett and Broyhill *Amici* Brief at 7-8. Like Davis, these two incurred FEC fines after they failed to comply with Section 319's clear reporting requirements. Both claim that their staff or outside vendors were unaware of the new law's reporting requirements.[7] *Id.* at 2. Notably, however, the FEC has published since at least March 2004 a "Millionaires'

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[7] Broyhill also attributes his violation to "inadequate reporting systems implemented by the FEC," though he never bothers to explain this assertion. DeRossett and Broyhill *Amici* Brief at 2.

Amendment Brochure," which is available on its website and provides a plain-English explanation of Section 319's reporting requirements. *See* FEC, Millionaires' Amendment Brochure at 3-4, *available at* http://www.fec.gov/pages/brochures/millionaires_brochure.pdf. The FEC's 2004 "Campaign Guide for Congressional Candidates and Committees"[8] discusses these same requirements in detail.

In short, the contention that Section 319's reporting requirements burden self-financed candidate's speech is meritless.

D. Section 319 does not burden the speech of contributors.

Although not raised by Davis, *amici* DeRossett and Broyhill assert that Section 319's variable contribution limits violate the First Amendment and equal protection rights of self-financed candidates' contributors. DeRosett and Broyhill *Amici* Brief at 15-17. To support this novel theory, *amici* seize upon a sentence from *Buckley* to the effect that "the size of [a] contribution provides a very rough index of the intensity of the contributor's support for the candidate." *Id.* at 15 (quoting *Buckley*, 424 U.S. at 21). From this, *amici* suggest that contributors' constitutional rights are violated if, in limited circumstances, they are not allowed to make as large a contribution to a self-financed candidate as to other candidates.

When this statement in *Buckley* is read in context, however, it becomes clear that this Court's point was both important and exactly the opposite of what *amici* suggest:

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[8] *Available at* http://www.fec.gov/pdf/candgui.pdf.

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. *The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.* At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Buckley, 424 U.S. at 20-21 (emphasis added).

This discussion formed the basis for the Court's important distinction between the levels of constitutional scrutiny applied to limits on contributions and limits on expenditures. Thus, a crucial premise of this Court's decision in *Buckley* is that the communicative value of a contribution is symbolic and is *not* directly related to its size. The premise of *amici*'s argument is precisely the opposite: that the amount of a contribution is crucial to its

communicative value. Under *Buckley*, this is wrong. Because Section 319 leaves contributors free to associate with self-financed candidates and to make symbolic contributions to them, it does not run afoul of *Buckley* in the manner *amici* suggest and does not violate the rights of contributors.[9]

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[9] *Amici's* contention that Section 319 "taxes" contributions to self-financed candidates, *see* DeRossett and Broyhill *Amici* Brief at 16, is similarly meritless. *Amici* point to the gross receipts component of Section 319. But that component takes into account 50 percent of the gross receipts that *both* candidates received in the year before the election. 2 U.S.C. § 441a-1(a)(2)(B). A contribution to a self-financed candidate is treated exactly the same as a contribution to his opponent for purposes of calculating the gross receipts. In other words, two off-year contributions of equal size—one to a self-financed candidate and one to his opponent—will offset each other. There is thus no unique "tax" associated with contributions to self-financed candidates.

CONCLUSION

Section 319 does not restrict speech. Rather, the statute lowers wealth barriers to running for office, increases candidate participation in House elections, enhances political debate, and promotes public confidence in the democratic process. *Amicus* respectfully submits that the three-judge district court's decision should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX OF STATES HAVING 24-HOUR OR 48-HOUR REPORTING REQUIREMENTS

Alaska (ALASKA STAT. § 15.13.110(b) (24-hour reporting of contributions in excess of $250 made within nine days of election));

California (CAL. GOV. CODE §§ 84203(b), 84204(a) (24-hour reporting of late contributions and independent expenditures));

Colorado (COLO. CONST. art. XXVIII, § 5) (48-hour reporting of independent expenditures in excess of $1,000 within 30 days of the election));

Delaware (DEL. CODE ANN. tit. 15, § 8031(b) (24-hour reporting of independent expenditures of more than $100 less than 20 days but more than 1 day before the election));

Georgia (GA. CODE ANN. § 21-5-34(c)(2)(C), (f)(1) (two-business-day reporting of contributions and independent expenditures of $1,000 or more made within last two weeks before the election));

Idaho (IDAHO CODE ANN. §§ 67-6607, 67-6611 (48-hour reporting of late contributions and independent expenditures of $1,000 or more));

Illinois (10 ILL. COMP. STAT. 5/9-10(b-5) (late reporting of contributions of more than $500 within two business days));

Indiana (IND. CODE § 3-9-5-22(d) (48-hour reporting of certain late contributions));

Iowa (IOWA CODE § 68A.404(3)(a) (48-hour reporting of independent expenditures exceeding $750));

Louisiana (LA. REV. STAT. ANN. § 18:1495.4(C) (48-hour reporting of late contributions or loans));

Maine (ME. REV. STAT. ANN. tit. 21-A, § 1017 (24-hour reporting of late contributions of $1,000 and 48-hour reporting for candidates who choose not to participate in public financing system and receive or spend more than public financing grant));

Michigan (MICH. COMP. LAWS §§ 169.232(1), 169.233(5) (48-hour reporting of late contributions and independent expenditures));

Minnesota (MINN. STAT. § 10A.20 (48-hour reporting of certain late loans, contributions, and independent expenditures));

Mississippi (MISS. CODE ANN. § 23-15-807(f)(i) (48-hour reporting of late contributions of more than $200));

Missouri (MO. REV. STAT. §§ 130.047, 130.050(3) (24-hour reporting of late contributions or loans and 48-hour reporting of expenditures of $500 or more made within 14 days prior to the election));

Montana (MONT. CODE ANN. § 13-37-226(1)(b) (24-hour reporting of contributions of $200 ten days or less before the election));

Nebraska (NEB. REV. STAT. §§ 49-1458(1), 49-1478.01(1) (48-hour reporting of late contributions and independent expenditures));

New Hampshire (N.H. REV. STAT. ANN. § 664:6 (24-hour reporting of late contributions and independent expenditures of $500 or more));

New Jersey (N.J. STAT. ANN. §§ 19:44A-11, 19:44A-16(i) (48-hour reporting of contributions of $500 or more or expenditures of $800 or more made 13 days or less before the election));

New Mexico (N.M. STAT. § 1-19-29(B)(2) (24-hour reporting of certain contributions received within the last week before the election));

New York (N.Y. ELEC. LAW § 14-108) (24-hour reporting of late contributions or loans exceeding $1,000));

North Carolina (N.C. GEN. STAT. § 163-278.9 (48-hour reporting of contributions or transfers of $1,000 or more));

North Dakota (N.D. CENT. CODE § 16.1-08.1-04 (48-hour reporting of late contributions of $500 or more));

Ohio (OHIO REV. CODE ANN. § 3517.10(A)(4) (two-business-day reporting of contributions aggregating $10,000 or more received from a contributor 19 days or less before election));

Oklahoma (OKLA. STAT. tit. 74, Ch. 62, App. 257, §§ 10-1-15, 10-1-16 (24-hour reporting of late contributions, loans, or independent expenditures of $500 or more));

Pennsylvania (25 PA. STAT. § 3248 (24-hour reporting of late contributions or independent expenditures of $500 or more));

South Dakota (S.D. CODIFIED LAWS § 12-27-28 (48-hour reporting of contributions of $500 or more received within 14 days of the election));

Tennessee (TENN. CODE ANN. § 2-10-105(h) (next-business-day reporting of contributions of $5,000 or more received 10 days or less before the election by a candidate for state office));

Texas (TEX. ELEC. CODE ANN. §§ 254.038, 254.039 (next-business-day reporting of certain late contributions and 48-hour reporting of certain late independent expenditures));

Vermont (VT. STAT. ANN. tit. 17, §§ 2811, 2893 (24-hour reporting of contributions over $2,000 received within 10 days of the election and "mass media activities" of $500 or more within 30 days of the election));

Virginia (VA. CODE ANN. §§ 24.2-945.2, 24.2-947.9 (next-day reporting for certain contributions received on or after

the 12th day for the election and 24-hour reporting of independent expenditures));

Washington (WASH. REV. CODE §§ 42.17.105(3), 42.17.103(1) (24-hour and 48-hour reporting for late contributions of $1,000 or more and 24-hour reporting of independent expenditures of $1,000 or more));

West Virginia (W. VA. CODE § 3-8-2(b) (24-hour reporting of independent expenditures of $1,000 or more));

Wisconsin (WIS. STAT. § 11.12 (5)-(6) (24-hour reporting of contributions of $500 or more and independent expenditures of $20 or more received or made less than 15 days before the election)).

AMICUS CURIAE BRIEF

No. 07-320

IN THE

Supreme Court of the United States

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEMOCRACY 21, THE CAMPAIGN LEGAL CENTER, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, AND PUBLIC CITIZEN, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEE

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IN THE

Supreme Court of the United States

No. 07-320

JACK DAVIS,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INTERESTS OF AMICI CURIAE[1]

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. It supports campaign finance and other political reforms, conducts public education efforts to accomplish these goals, participates in litigation involving the constitu-

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

tionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented. Democracy 21 has participated as counsel or amicus curiae in a number of cases before this Court involving the constitutionality of the campaign finance laws.

The Campaign Legal Center ("CLC") is a non-partisan, non-profit organization that works in the area of campaign finance, voting rights, and election law, generating public policy proposals and participating in state and federal court litigation throughout the nation. The CLC's work has focused on constitutional campaign finance disclosure and regulation, campaign finance enforcement, voting rights, and governmental integrity laws. The CLC also works with Congress to promote campaign finance and lobbying reform, and to strengthen federal ethics rules and enforcement. The CLC has served as co-counsel for parties or amici curiae in a number of cases before this Court.

The Brennan Center for Justice at NYU School of Law is a non-partisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution. Through legislative efforts and litigation, the Brennan Center actively supports strong federal campaign finance laws that meet constitutional standards and encourage broad candidate participation in federal elections.

Public Citizen, Inc., is a non-profit, membership advocacy organization that appears before Congress, administrative agencies, and the courts on a wide range

of issues. Prominent among Public Citizen's concerns is combating the corruption, and appearance of corruption, of our political processes that can result from unfettered infusions of private funds into political campaigns. Public Citizen therefore seeks to enact and defend workable, balanced, and constitutional campaign finance reform legislation such as the provision of the Bipartisan Campaign Reform Act ("BCRA") that is at issue here. Public Citizen has advocated, and continues to advocate, campaign finance legislation (including public funding legislation) before Congress, and Public Citizen and its attorneys have been involved in various capacities, including as amicus curiae and counsel, in a large number of litigated cases involving the constitutionality of such legislation.

Each of the amici advocated the enactment of BCRA, and each has participated in the defense of the statute in the lower courts and in cases previously before this Court involving BCRA's constitutionality. Amici therefore have a substantial interest in the issues presented by this case.

STATEMENT

This case involves a facial constitutional challenge to Section 319 of the Bipartisan Campaign Reform Act ("BCRA"), part of the so-called "Millionaires' Amendment." If certain conditions are met, Section 319 raises the usually-applicable limits on contributions a candidate for the United States House of Representatives may accept when his or her opponent contributes more than $350,000 in personal funds to his own campaign. *See* 2 U.S.C. § 441a-1(a)(1)(A)-(B). In these circumstances, Section 319 also relaxes the statutory limits on how much a political party may spend in coordination with a candidate whose opponent is self-financed above

$350,000. *See id.* § 441a-1(a)(1)(C). To implement these rules, Section 319 also establishes reporting requirements for both self-financing candidates and their opponents. *See id.* § 441a-1(b).

If a self-financing candidate chooses to spend more than $350,000 in personal funds, Section 319 requires an opposing candidate to calculate the "opposition personal funds amount" ("OPFA") for purposes of determining whether he or she is eligible to proceed under the alternative rules. *See* 2 U.S.C. § 441a-1(a)(2). The OPFA formula compares the total "expenditures from personal funds" by each candidate, which is defined to include not only each candidate's personal expenditures, but also his or her "gross receipts advantage." A candidate's gross receipts advantage is calculated, in turn, by comparing 50 percent of the aggregate contributions raised by each candidate during the year prior to the election. *Id.* An opposing candidate may qualify for the alternative rules only if, according to the OPFA formula, the self-financing candidate's expenditures from personal funds exceed his or her own by more than $350,000. *Id.* § 441a-1(a)(1). Section 319 caps the amount of increased contributions that any candidate may receive at 100 percent of the amount of the total OPFA disparity between the candidates. *Id.* § 441a-1(a)(3)(ii).

In the 2004 election cycle, following passage of Section 319, of all opponents of self-financed candidates who triggered the Millionaires' Amendment, only 13 raised more than 10 percent of their total campaign funds from increased contribution limits. J.A. 84. In addition, candidate reports filed with the Federal Election Commission ("FEC") indicate that, in total, self-financed candidates who triggered the Millionaires' Amendment spent more than $144 million of their own

funds in 2004 and 2006. J.A. 89. By comparison, their opponents collectively raised a total of only $8.6 million in increased contributions under Section 319. *Id.*

Appellant, a candidate for the House of Representatives, notified the FEC of his intent to spend $1 million in personal funds during the general election campaign in 2006 (J.A. 103) and filed suit against the FEC in federal district court. Appellant argued that, on its face, Section 319 violates both the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. In particular, Appellant—who has twice run self-financed campaigns for Congress since enactment of the challenged statute—argued that Section 319 impermissibly chilled his speech and would have the effect of deterring self-financing candidates from running for the House of Representatives because it conferred a benefit on their opponents.

A three-judge district court rejected Appellant's argument, finding that Section 319 does not burden speech because it "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." J.S. App. 9a. Similarly, the district court found that Section 319 does not confer an unfair competitive advantage on the opponents of self-financing candidates, as any disadvantage the Appellant may feel he suffers "is the result of the candidate's choice to fund his campaign from one of several permissible funding sources." J.S. App. 11a. The court rejected Appellant's equal protection argument because he had failed to show that Section 319 treats similarly situated persons differently. J.S. App. 17a.

On appeal, the Appellee asserts that the case is moot and that Appellant lacks standing. *See* Mot. to Dismiss or Affirm 12-14; Appellee Br. 18-28. This amicus brief addresses only Appellant's First Amendment allegations.

SUMMARY OF ARGUMENT

Section 319 expands, and does not restrict, the opportunities for speech in the political process. On its face, the provision places no restriction on expenditures by candidates who choose to self-finance their political campaigns. Instead, Section 319 *relaxes*, in some circumstances, otherwise applicable contribution and coordinated-expenditure rules with regard to opponents of self-financing candidates who spend more than $350,000 from personal funds. Appellant's contention that Section 319 chills speech is not supported by the record.

Section 319's notification requirements also comport with the First Amendment. They are no more burdensome than other requirements under existing law, including those this Court upheld in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

Appellant wrongly criticizes the district court's analogy to lower court decisions upholding various state public funding provisions. Amici James Madison Center for Free Speech and Citizens United, however, go further, urging this Court to offer essentially advisory opinions on issues not presented in this case. This Court should reject that request. The lower courts have been consistent in their application of this Court's holding in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which approved of Congress's approach to providing public funding for presidential campaigns. Moreover, public

funding mechanisms involve a unique set of governmental interests that should be evaluated on their own terms and in the context of the specific statutory incentives used.

Finally, the fact that Section 319 relaxes certain contribution limits in no way impugns the general validity of the anti-corruption rationale supporting campaign contribution limits—a rationale long approved of by this Court. In enacting Section 319, Congress carefully balanced its interest in preventing corruption with its concerns that non-wealthy candidates were being driven from the political process. This Court should, as has been its custom, defer to Congress's reasoned judgment in this field.

ARGUMENT

I. SECTION 319 DOES NOT RESTRAIN SPEECH

A. Section 319 Expands The Opportunity For Speech And Does Not Limit A Candidate's Expenditures

By its terms, Section 319 expands, and does not restrict, the exercise of political speech. When one candidate for the House of Representatives spends more than $350,000 from personal funds, that candidate's opponent may, in some circumstances and subject to limits: (1) receive contributions from individuals up to three times the normal $2,300-per-election limit for each donor; (2) receive contributions from individuals who have reached the otherwise applicable statutory limit for aggregate campaign donations; and (3) coordinate expenditures with a political party above normally applicable limits. 2 U.S.C. § 441a-1. As the district court recognized, Section 319 neither deprives the self-financing candidate of funds nor divests the candidate of any other potential benefit. Rather, it *relaxes*, in

limited circumstances, restrictions placed on the self-financing candidate's opponents.

Appellant mistakenly equates Section 319 to the expenditure caps that this Court invalidated in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *See, e.g.*, Appellant Br. 21 (describing Section 319 as "Congress's second attempt to regulate personal spending"). In *Buckley*, this Court upheld the Federal Election Campaign Act's ("FECA") limits on contributions to candidates for federal office, but invalidated FECA's expenditure limits, including a cap on the amount a candidate could spend from his or her own personal funds. 424 U.S. at 13-59. The Court observed that FECA's expenditure limits represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech" and had the effect of "restrict[ing] the quantity of campaign speech by individuals, groups, and candidates." *Id.* at 19, 38. Addressing the cap on candidates' personal expenditures, the Court noted the importance of allowing candidates to have the "unfettered opportunity to make their views known," and concluded that the expenditure limits "clearly and directly" interfered with a candidate's ability to engage in protected First Amendment expression. *Id.* at 52-53.

Section 319 operates in precisely the opposite manner. Rather than imposing a ceiling on the amount a candidate (or anyone else) may spend, Section 319 *relaxes* certain contribution and coordinated-expenditure limits that would otherwise apply to the opponent of a candidate who self-finances beyond the $350,000 threshold. Every candidate remains free to spend as much as he or she pleases, without limit. The framework that Congress has created thus allows each candidate the "unfettered opportunity" to make his or her views known according to whatever fundraising strat-

egy the candidate deems most advantageous. *Buckley*, 424 U.S. at 52.

Appellant contends that Section 319 nevertheless has the *effect* of limiting personal expenditures to less than $350,000 because self-financing candidates will not want to confer a benefit on their opponents. But there is no proof in the record that Section 319 has chilled *any* candidate expenditures or speech—much less the "substantial" quantity of speech required to sustain a facial challenge. *See Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002). In fact, as Appellant readily acknowledges, his own past practices show that candidates can—and do—choose to exceed the $350,000 threshold. Appellant Br. 43 n.17. Following the enactment of The Bipartisan Campaign Reform Act ("BCRA"), Appellant had three choices going into the 2004 and 2006 elections: 1) forgo self-financing altogether and rely exclusively on contributions; 2) supplement such contributions with up to $350,000 of his own money; or 3) spend more than $350,000 of his own money with the knowledge that his opponent could benefit from alternative rules as a result. Appellant chose the third option on both occasions (*see* J.S. App. 13a), revealing that, whatever the benefits conferred on his opponent, Section 319 neither deterred Appellant from self-financing above $350,000 nor had the effect of capping his own expenditures on his speech.

There is no evidence in the record to support a finding of any chilling effect on other similarly situated candidates. Amici Gene DeRossett and J. Edgar Broyhill II, both candidates for the House of Representatives in 2004, speculate that Section 319 "may well" have had an impact on the number of self-financing candidates, *see* Br. of Amici DeRossett and Broyhill 13, but both exceeded the $350,000 threshold in their own respective

congressional races. *See* Def. FEC's Exs. Submitted In Supp. Of Its Mot. For Summ. J. & In Opp. To Pl.'s Mot. For Summ. J., Ex. 9, Attach. 1, at 1. Indeed, the lone study these candidates cite for this proposition undercuts their assertion. *See* Jennifer A. Steen, *Self-Financed Candidates and the "Millionaires' Amendment,"* in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* 204, 205 (Michael J. Malbin ed., 2006) (concluding there is "no way to know exactly how the Millionaires' Amendment changed the course of the 2004 elections" given the multiple variables involved and that at best it had a "limited" impact).

What evidence does exist supports the opposite conclusion. Public sources show, for example, that the number of candidates who used more than $1,000,000 of their own funds increased from 2002 to 2006.[2]

Appellant and his amici contend that Section 319 burdens candidate speech in the same manner as the "right-of-reply" provision struck down in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). *See* Appellant Br. 42-43; Br. of Amici DeRossett and Broy-

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[2] *See* Center for Responsive Politics, Millionaire Candidates, http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2002; http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2004; http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2006. Furthermore, in many cases a candidate who trips Section 319's trigger may not even face increased spending in response. In the 2004 congressional election, 93 candidates between the primary and general elections were eligible to raise money under increased contribution limits; 37 of them did not report a single contribution in excess of $2,000. Steen, *Self-Financed Candidates*, 210-211.

hill 10-11. But *Tornillo*, a "compelled access" case,[3] is inapposite. The statute there provided that if a newspaper assailed a candidate's character or record, the candidate could require the newspaper to print a reply of equal prominence. This Court held that, by compelling newspapers to disseminate the views of speakers with whom they did not agree, the statute deterred newspapers from speaking in the first instance. 418 U.S. at 257-258. The Court also concluded that the statute directly interfered with "editorial control and judgment" by forcing a newspaper to tailor its speech to opposing agendas, and to respond to candidates' arguments where the newspaper might prefer to remain silent. *Id.* at 258.

Section 319 is altogether different. Section 319 does not compel a self-financing candidate to say—or not say—anything; nor does it require a self-financing candidate to spend his or her own resources to accommodate the speech of an opponent. Decisions about whether and how much to self-finance are within the complete control of each individual candidate based on a choice about what strategy will be most advantageous. Unlike the newspaper editor facing a right-of-reply mandate, a candidate considering whether to spend more than $350,000 in personal funds faces no prospect of having to provide (and pay for) a forum for an opponent's message or to compromise his or her own message. Finally, as discussed, there is no evidence

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[3] *See also, e.g., Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 13-15 (1986) (invalidating a statute requiring a utility company to include with its monthly bills a newsletter published by a consumer group that had been critical of the utility's ratemaking practices because the regulation provided benefits to speakers on the basis of their viewpoint).

demonstrating that Appellant, his amici, or others have been chilled by operation of Section 319.

In the end, Appellant's challenge is not about a limit on his speech, but rather about his concern that an opponent might have funds available to engage in *more* speech by taking advantage of Section 319. But there is no constitutional right to outspend an opponent or to engage in more speech relative to another speaker. *See Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 14 (1986) (observing that there is no "right to be free from vigorous debate"). Where the Court has encountered direct expenditure limits, such as those at issue in *Buckley*, the Court has struck them down not to preserve or strengthen a candidate's relative position in a political race, but to protect the candidate's "right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." 424 U.S. at 52. Section 319 protects that right by leaving a self-financing candidate unfettered while expanding the overall opportunities for speech in the electoral process.

Section 319, moreover, is tailored to reduce any risk that it would give an opponent of a self-financing candidate an unfair advantage. For example, Section 319 requires a candidate seeking to take advantage of its alternative rules to calculate his or her "opposition personal funds amount" ("OPFA"). That formula incorporates 50 percent of the aggregate receipts raised by each candidate during the year prior to an election, 2 U.S.C. § 441a-1(a)(2), thereby reducing the relative advantages of incumbents, who are less likely to self-finance. *See, e.g.*, Def. FEC's Exs., Ex. 9, Attach. 1, at 1-2 (indicating that of the more than 60 candidates for congressional office who self-financed above the Millionaires' Amendment's thresholds in 2004 and 2006,

only 2 were incumbents). Moreover, Section 319 caps the amount of increased contributions a candidate may receive at 100 percent of the OPFA disparity between the candidates. *Id.* § 441a-1(a)(3)(ii).

In sum, Section 319 *expands* the overall opportunities for speech while preserving the ability of candidates who choose to fund their own campaigns to spend as much money as they like and to choose the financing avenues that best serve their interests. As Senator DeWine explained during the debate over the provision: "This amendment is truly about the [F]irst [A]mendment—it is about free speech—and it is about allowing candidates to have the opportunity to take their ideas into the marketplace, to broadcast them, to be able to pay for the commercials, and to have their exchange of ideas in that political marketplace that our Founding Fathers deemed so very important." 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001); *see also id.* at S2538 ("[T]he wealthy candidate, again, is not punished, is not inhibited, is not discouraged from putting in his or her own money."); *id.* at S2540 (statement of Sen. Durbin) ("[Without the Millionaires' Amendment, t]he voters lose. If the system works as it is supposed to, you have a choice on election day. In order to have a choice, you have information about all candidates. That means you have an information source not only from a wealthy candidate but from someone who is not so wealthy."). Section 319 therefore, in the tradition of other campaign finance laws, serves to promote "open public political discussion" and participation in the political process.[4]

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[4] Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002) (explaining that campaign finance laws

B. Section 319's Notification Requirements Do Not Burden Speech

Section 319 requires self-financing candidates for the House of Representatives to file: (1) a declaration of intent within 15 days of becoming a candidate that discloses the amount in personal funds in excess of $350,000 that the candidate intends to spend; (2) an initial notification within 24 hours of spending more than $350,000 of personal funds; and (3) additional notifications within 24 hours following each aggregate expenditure over $10,000. 2 U.S.C. § 441a-1(b). These notification requirements, which are essential to the implementation and enforcement of Section 319's substantive requirements, operate in tandem with other, similar provisions in FECA.

Appellant claims that Section 319's notification requirements impose a "substantial burden" on his political expression. But these requirements are no more burdensome than similar requirements that have been upheld by this Court. In particular, as the district court recognized, the 24-hour notification requirements

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"further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy"); *see also Buckley*, 424 U.S. at 92-93 & n.127 (noting that "[l]egislation to enhance . . . First Amendment values is the rule, not the exception" and Congress's establishment of taxpayer funding of presidential campaigns was an "effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people"); *McConnell* v. *FEC*, 540 U.S. 93, 140 (2003) (upholding BCRA's primary soft money restrictions and noting that "the restriction . . . tends to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors").

for spending over $350,000 and additional aggregate expenditures over $10,000 resemble the 24-hour reporting requirements in BCRA Section 201 that this Court upheld in *McConnell* v. *FEC*. *See* 540 U.S. 93, 194-195 (2003) (upholding BCRA Section 201 reporting requirements, which impose a 24-hour deadline for disclosure of expenditures relating to "electioneering communications" totaling more than $10,000 in a calendar year); *id.* at 321 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring on the constitutionality of BCRA's basic disclosure provision).[5]

Appellant asserts that Section 319's primary flaw lies not in the timing but rather in the "unilateral disclosure of sensitive campaign strategy." Appellant Br. 40. But neither Appellant nor his amici can point to any such "sensitive" information that would not otherwise be disclosed under existing law by *every* candidate.[6]

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[5] Amici James Madison Center for Free Speech and Citizens United mistakenly claim that strict scrutiny applies to Section 319's disclosure provisions, despite their acknowledgment that such a standard was not applied to the more detailed disclosure provisions at issue in *McConnell*. *See* Br. of Amici James Madison Center for Free Speech and Citizens United 16 (arguing that strict scrutiny should apply and that "nothing can properly be read into *McConnell*'s use of 'important'" when describing the state interests that led the *Buckley* Court to uphold FECA's disclosure requirements). Nothing here requires this Court to apply a different level of scrutiny in this case than it did in reviewing other disclosure provisions of BCRA.

[6] Indeed, the expenditure information required by a self-financing candidate under the 24-hour reporting rules is no more "sensitive" or "strategic" than the information required of his opponent. *See* 11 C.F.R. § 400.31(e)(1)(ii) (requiring opposing candidate to notify his political party and the FEC of OPFA within 24 hours if he has received increased individual contributions and in-

See 2 U.S.C. § 434(b); 11 C.F.R. § 104.3 (requiring periodic, detailed reports of expenditures). Indeed, given that Section 319 requires disclosure only of the amount of money spent by the candidate himself, and not the names of supporters or the uses of such funds, the information required is less "sensitive" and less likely to curb or influence a candidate's political speech than other provisions this Court has upheld. *See, e.g., McConnell*, 540 U.S. at 194-195 (explaining that Section 201 requires disclosure of "*all persons* sharing the costs of the [electioneering communications] disbursements" and, where applicable, "*all persons who contributed $1,000 or more*" to a segregated account or individual making the disbursement (emphasis added)).

Appellant describes Section 319's declaration of intent requirement, which must be filed within 15 days of announcing one's candidacy, as "particularly burdensome." But advance filings are nothing new to candidates. *See, e.g.*, 2 U.S.C. § 432(e)(1) (imposing 15-day deadline for candidates to designate campaign committee). In *McConnell*, this Court upheld an advance notice provision that was, if anything, more revealing of a candidate's strategy than Section 319. Section 201 of BCRA, the amendment to FECA Section 304, requires disclosure of executory contracts for communications that have not necessarily aired, which has the effect of revealing information such as where political ads will be run and by whom. *See McConnell*, 540 U.S. at 199-201. Section 319, by contrast, reveals only an early intention by a self-financing candidate to spend more than $350,000 of personal funds. It says nothing else

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creased coordinated party expenditures equal to 100 percent of OPFA).

about a candidate's strategy or the content of his or her message. Thus, there is no reason to believe that Section 319 imposes a greater burden on speech than Section 201, which this Court concluded does "not prevent anyone from speaking." *Id.* at 201 (internal quotation marks omitted).

II. Any Attack On Public Funding In This Case Is Misplaced

In concluding that Section 319 does not impermissibly burden speech, the district court drew an analogy to lower court decisions that reviewed various state public funding schemes. J.S. App. 9a-13a. Although Appellant contends that the district court's analogy does not fit, he does not take issue with public funding in general, nor does he argue against the public funding provisions in those cases, which trigger higher expenditure and contribution limits or higher funding amounts when a non-participating candidate spends above a threshold amount; to the contrary, he *acknowledges* their constitutionality. Appellant Br. 54-55; J.S. 11-12.

Amici James Madison Center for Free Speech and Citizens United, on the other hand, depart from Appellant's position and encourage this Court to take the extraordinary step of addressing in this case the constitutional foundation of these lower court decisions. *See* Br. of Amici James Madison Center for Free Speech and Citizens United 26-28. This Court should reject the extraordinary request to comment on cases that are not before the Court and that involve statutes substantively different from Section 319. Whatever the value of the district court's analogy, no party here has asked the Court to delve into an area of the law where the lower courts are in substantial agreement.

In *Buckley*, this Court approved of conditioning acceptance of public funds for presidential campaigns on an agreement by the candidate to abide by specified expenditure limits. The Court reasoned that, "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." 424 U.S. at 57 n.65.[7]

Relying on *Buckley*, a decision that Appellant does not challenge,[8] lower courts have overwhelmingly sustained state public funding provisions that contain various incentives for candidates to accept public funding,[9]

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[7] *See also Republican Nat'l Comm.* v. *FEC*, 487 F. Supp. 280, 283-284 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980) (holding Presidential Election Campaign Funding Act was constitutional because "[e]ach candidate remains free" to choose the method of campaign financing most advantageous to speech).

[8] *See, e.g.*, Appellant Br. 54 (acknowledging that the district court, relying on *Buckley*, "correctly noted that a public funding system does not pose an unconstitutional burden where the disadvantage is the result of the candidate's choice to fund his campaign from one of several permissible funding sources" (internal quotation marks omitted)).

[9] Public funding legislation takes a number of forms. Under some schemes, candidates are provided additional public funds in the event a high-spending non-participating opponent exceeds certain expenditure or contribution amounts, or when independent expenditures occur. *See, e.g.*, Me. Rev. Stat. Ann. tit. 21-A § 1125(9). In other variations, expenditure and contribution limits are relaxed or eliminated when the spending of non-participating candidates passes a threshold amount. Thus, rather than providing participating candidates with more public money, this model simply allows a publicly-financed candidate greater opportunity to raise and spend private money. *See, e.g.*, Minn. Stat. Ann. § 10A.25(10).

concluding that those provisions do not coerce candidates into sacrificing their First Amendment rights to free expression. *See Daggett* v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 451, 464 (1st Cir. 2000) (upholding Maine Clean Election Act, which contains a triggering provision providing increased public funding to participating candidates when spending of non-participating candidates exceeds threshold); *Gable* v. *Patton*, 142 F.3d 940, 948-949 (6th Cir. 1998) (upholding Kentucky public funding law that provided participating candidates with two-for-one matching funds and lifted the applicable expenditure and contribution limits in the event the spending of a non-participating candidate exceeded a triggering amount); *Rosenstiel* v. *Rodriguez*, 101 F.3d 1544, 1549-1552 (8th Cir. 1996) (upholding Minnesota public funding law waiving expenditure limits for publicly-financed candidates when a non-participating candidate exceeds a triggering amount of contributions and expenditures);[10] *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 30, 39 (1st Cir. 1993) (upholding Rhode Island's "contribution

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[10] In *Day* v. *Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994), the Eighth Circuit invalidated a Minnesota provision that increased spending limits and the amount of public funds available to a candidate opposing a non-publicly-financed candidate when an independent expenditure was made on behalf of the non-financed candidate. The Eighth Circuit in *Rosenstiel* attempted to distinguish this earlier, seemingly contradictory holding. 101 F.3d at 1555. At most, *Day*'s holding is limited to public financing schemes that provide candidates with additional public funds based on independent expenditures not within the candidate's control. *See, e.g., Daggett*, 205 F.3d at 464 n.25 ("We recognize that there may be a difference between expenditures by a candidate and those by a non-candidate, but nonetheless agree that the continuing vitality of *Day* is open to question.").

cap gap" provisions, which entitle publicly-financed candidates to contribution limits double those of non-financed candidates); Order, *Green Party of Conn.* v *Garfield*, No. 06-cv-1030, at 56-58 (D.Conn. Mar. 20 2008) (dismissing challenge to triggering provisions o Connecticut public funding law, which provide for the release of additional public funds if a participating candidate is outspent by a non-participating candidate o by any other non-candidate or organization); *Jackson* v *Leake*, 476 F. Supp. 2d 515, 519, 530 (E.D.N.C. 2006) *argued on appeal sub nom. Duke* v. *Leake*, No. 07-145 (4th Cir. Dec. 7, 2007) (upholding a North Carolina public funding law for judicial elections that provides public "rescue funds" for participating candidates in the event contributions or expenditures of a non-participating candidate, independent or otherwise, exceed a specified triggering amount).[11] These cases are instructive fo

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[11] These represent only some of the many state public funding schemes on the books. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-95 (providing increased public funds to participating candidates whe the expenditures of a non-participating candidate exceed a certain triggering amount); Fla. Stat. Ann. § 106.355 (relieving a participating candidate from expenditure limits if non-participating opponent exceeds expenditure limits applicable to publicly-financed candidates, and continuing to provide matching funds to participating candidates); Neb. Rev. Stat. Ann.. § 32-1604 (conditioning the receipt of public funds by participating candidate on required expenditure minimums by non-participating candidate); Wis. Stat Ann. § 11.50(2)(i) (providing that participating candidate who accepts a public grant is not bound by contribution and disbursement limits if he faces an opponent who has not accepted a grant, unless the opponent files an affidavit of compliance with the limitations).

While not yet law, Congress is also considering bills to reform the existing presidential public financing laws in order to increase the speech of presidential candidates through public financing mechanisms that provide additional incentives for candidates t

the reason given by the district court: they hold that as long as candidates can *choose* how to fund their campaigns and a government benefit does not force a candidate to curtail his or her speech, triggering provisions like those reviewed in these cases are constitutional.

But public funding mechanisms also involve a unique set of governmental interests that must be evaluated on their own terms and in the context of the specific statutory incentives used. In *Buckley*, this Court explained several of the core values served by public funding. Reviewing Congress's effort to provide optional funding for presidential elections, the Court observed that FECA's public funding scheme represented an effort "to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. The Court further recognized that public funding helps "eliminat[e] the improper influence of large private contributions" and "reliev[es] . . . candidates from the rigors of soliciting private contributions."[12] *Id.* at 96. Taking into account these varying

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participate. The "Presidential Funding Act of 2007" provides additional public funds and increases the expenditure limit for presidential candidates participating in public funding who are opposed by non-participating candidates when the non-participating candidate receives contributions or makes expenditures in an aggregate amount greater than 120 percent of the applicable expenditure limit. *See* S. 2412, 110th Cong. (2007); H.R. 776, 110th Cong. (2007).

[12] The lower courts have echoed the importance of these values in upholding state public financing laws. *See, e.g. Daggett*, 205 F.3d at 450 (noting the "state's interest in curbing the power of money in politics"); *Rosenstiel*, 101 F.3d at 1553 (noting the "compelling" governmental interest of "promot[ing] a reduction in the possibility for corruption that may arise from large campaign contributions and a

compelling governmental interests, courts have reviewed public funding laws with an eye toward ensuring that the incentives used involve "a roughly proportionate mix of benefits and detriments." *Daggett*, 205 F.3d at 472.

Accordingly, this case presents no occasion for the Court to consider or to address a remarkably consistent set of lower court decisions rejecting challenges to state public financing schemes that differ from Section 319.

III. CONGRESS'S DECISION TO ADJUST CONTRIBUTION LIMITS FOR OPPONENTS OF CANDIDATES WHO CHOOSE TO SPEND LARGE SUMS OF PERSONAL WEALTH IS CONSISTENT WITH THE VALUES SERVED BY BCRA'S CONTRIBUTION LIMITS

A. This Court Has Consistently Upheld Congressional Judgment Regarding Contribution Limit Levels

This Court has consistently sustained the prevention of corruption and the appearance of corruption as constitutionally sufficient justifications for contribution

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diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice*, 4 F.3d at 39 (noting that "the state possesses a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption") (citing *Buckley*, 424 U.S. at 91). This Court also identified in *Buckley* two interests specific to public financing schemes that distinguish between major and minor party candidates: protecting the public fisc by "not funding hopeless candidates with large sums of public money" and protecting the electoral process by not providing "artificial incentives to splintered parties and unrestrained factionalism." *Buckley*, 424 U.S. at 95-96 (internal quotation marks omitted).

limits. Appellant acknowledges as much, stating in his brief, "Congress originally imposed contribution limits in election campaigns to address concerns about the appearance and actuality that large campaign donations could unduly influence politicians." Appellant Br. 24 (citing *Buckley*, 424 U.S. at 26-28). In *Buckley*, this Court concluded: "It is unnecessary to look beyond [FECA]'s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." 424 U.S. at 26; *see also Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000) ("[T]he prevention of corruption and the appearance of corruption [is] . . . a constitutionally sufficient justification" for contribution limits. (internal quotation marks omitted)).

This Court has also consistently deferred to Congress's expert judgment in the crafting of these provisions, concluding, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (internal quotation marks omitted); *accord Shrink Mo.*, 528 U.S. at 397 ("[T]he issue in later [contribution limit] cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming. [T]he dictates of the First Amendment are not mere functions of the Consumer Price Index.").

B. Congress's Decision To Adjust Contribution Limits For Opponents Of Millionaire Candidates Does Not Impugn The General Validity Of Contribution Limits, And This Court Has Not Been Asked To Hold Otherwise

Appellant contends that Section 319 is inconsistent with the anti-corruption rationale, arguing that "Section 319 [is] an avenue for more private money to enter the system" and that it "likely increases the amount and influence of contributed funds in an election." Appellant Br. 54. But Appellant ignores the fact that in enacting Section 319, Congress *balanced* the need to combat corruption and its appearance with concerns that wealthy, self-financing candidates were driving candidates with fewer personal resources from the political arena. As Senator McCain explained on the floor of the Senate:

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. Section [319] does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election.

148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002); *see also* 144 Cong. Rec. H3780 (daily ed. May 22, 1998) (statement of Rep. Bennett) ("[T]his year, we have the lowest interest among 18 and 19-year old people in this country in government, in politics, and in public policy

than we have had in the last 30 years. There is a reason for that. The reason for that is that young people, in particular, feel disconnected from the system. They feel that this is a pay-as-you-go system. Unless they have money to get involved in this political process, they cannot be part of it.").

This Court has never suggested that Congress is foreclosed from adjusting statutory contribution limits for particular elections in order to accommodate competing governmental interests. *See McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."); *see also Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). Indeed, in areas where legislators possess particular expertise, this Court has time and again provided Congress and the states' legislatures with leeway to balance competing interests. *See Shrink Mo.*, 528 U.S. at 402-403 (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.") (citing, *inter alia*, *Frisby* v. *Schultz*, 487 U.S. 474, 485-488 (1988) (balancing rights of privacy and expression); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 192-194 (1997) (recognizing the speech interests of both viewers

and cable operators); *Burson* v. *Freeman*, 504 U.S. 191, 198-211 (1992) (plurality opinion) (weighing First Amendment rights against electoral integrity necessary for right to vote)). For example, in *Buckley*, this Court considered a requirement that candidates achieve 5 percent of the popular vote to qualify for general election public funding. In crafting this percentage requirement, Congress balanced the competing interests of "protect[ing] the public fisc and not foster[ing] factionalism." *Buckley*, 424 U.S. at 103. "[T]he choice of the percentage requirement that best accommodates the[se] competing interests," this Court held, "was for Congress to make." *Id.*

Appellant further argues that Congress's willingness to raise contribution limits in this context indicates that Section 319 is an incumbent-protection provision that provides "informational and financial benefits to the opponents of candidates who personally spend more than $350,000 on their campaign." Appellant Br. 22. This argument is not borne out by the statute itself or by the record. The statute addresses the fundraising advantage an incumbent might have through the calculation of OPFA. Indeed, available data from the 2004 election shows that in a substantial number of races where an incumbent faced a millionaire candidate whose spending surpassed the trigger amount, the trigger was not actually activated because the incumbent's OPFA amounts offset the self-financing. Steen, *Self-Financed Candidates*, 209.

Finally, Appellant contends that Congress raised contribution limits in Section 319 based on an impermissible rationale, that of "level[ing] the playing field" between millionaire and non-millionaire candidates. *See* Appellant Br. 34-36. While it is true that leveling the playing field is not a constitutionally sufficient in-

terest in the context of expenditure limits, *Buckley*, 424 U.S. at 48-49, it *is* legitimate for Congress to take steps to ensure that its anti-corruption measures do not have the unintended effect of *tilting* the field even more in favor of wealthy candidates. In particular, Section 319 is a legitimate effort to balance the ability of candidates to compete under special and uncommon circumstances with a general interest in reducing corruption and the appearance of corruption.

Section 319 therefore exemplifies Congress's proper use of its expertise to devise a system of campaign financing that best serves multiple public policy goals.

CONCLUSION

The judgment of the three-judge district court, accordingly, should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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v.
FEDERAL ELECTION COMMISSION, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF GENE DEROSSETT AND J. EDGAR BROYHILL II AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICI CURIAE* [1]

Amici are individuals who have been ensnared by the Millionaires' Amendment because they used personal funds while running for Federal office in recent election cycles. *Amici* can attest that the Amendment chills their speech and further skews the political playing field in favor of incumbents. According to the FEC, each of the *Amici* has run afoul of the Amendment and has been made to pay a substantial fine for doing so. They wish to call the Court's attention to their experience, which illustrates that the Amendment, in its practical operation, discourages political participation and dampens political competition.

Amicus Oscar Gene DeRossett is an employee of the U.S. Department of Agriculture who ran for Congress in 2004 in Michigan's 7th Congressional District. Because he believed in our political system and was committed to doing what he thought was necessary to compete in it, Mr. DeRossett borrowed against his home and retirement savings to spend about $530,000 of his personal funds during his campaign in the Republican primary.

The FEC fined Mr. DeRossett $59,000 for failing to comply with the Millionaires' Amendment pro-

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

vision requiring disclosure within 24 hours of expending more than $350,000 of personal funds on a campaign. The violation occurred because Mr. DeRossett's outside vendor responsible for handling such matters was unaware of the new law's demanding provisions. Mr. DeRossett paid the fine in 2007 out of his retirement savings. Prior to his 2004 run for Congress, Mr. DeRossett had run three straight successful campaigns for Michigan's House of Representatives. The personal and reputational costs Mr. DeRossett has incurred under the Millionaires' Amendment, however, have effectively disqualified him from running for office.

Amicus J. Edgar Broyhill II ran in the 2004 Republican primary for the U.S. House of Representatives in North Carolina's 5th Congressional District. He invested $350,000 of his personal funds in his campaign because he believed in our political system and was facing a competitive and difficult field.

In 2006, Mr. Broyhill paid a $71,100 fine to the FEC for allegedly failing to comply with the Millionaires' Amendment by not filing the requisite disclosure forms within 24 hours of expending these funds. The problem arose because Mr. Broyhill's campaign staff had been unaware of the provision and its requirements and because of inadequate reporting systems implemented by the FEC. Like Mr. DeRossett, Mr. Broyhill was personally liable for the fine imposed by the FEC. The personal costs Mr. Broyhill has incurred under the Millionaires' Amendment have dissuaded him from making another run for political office.

SUMMARY OF ARGUMENT

Section 319 of the Bipartisan Campaign Reform Act of 2002, the so-called "Millionaires' Amendment" governing House races, is complex in its mechanics yet elementary in its practical effect: it changes the rules of the game as soon as a self-financed candidate expends over a threshold amount of personal funds, discouraging that candidate by imposing special reporting requirements and lifting the limits on contributions that would otherwise apply to that candidate's opponent.

The Amendment thus burdens a self-financed candidate's decision to advocate his own election with personal funds. As the personal experience of *Amici* attest, the disclosure rules are not only burdensome but perilous. The Amendment also forces a self-financed candidate to enable his own opponent's hostile counterspeech by triggering relaxation of limits on contributions to that opponent. Ceilings on expenditures in political campaigns have long required strict First Amendment scrutiny. Regulations that deter or penalize such expenditures require scrutiny no less strict.

The Millionaires' Amendment also burdens the speech of contributors to political candidates. An individual may contribute up to $2,300 to the self-financed candidate, but up to $6,900 to his opponent. Accordingly, the extent to which a contributor may express support for a candidate depends on which candidate he supports. By discouraging self-financed candidates' and their contributors' speech, the Amendment reduces the quantity and quality of political speech. This is a loss to the political system,

for self-financed candidates raise issues that would not otherwise be addressed and challenge incumbents who would not otherwise face competitive races. For these reasons too, the Amendment should not be upheld unless narrowly tailored to a compelling interest.

But no legitimate, let alone compelling, interest supports the Millionaires' Amendment. It cannot be justified as combating corruption (or the appearance thereof), for it designedly works against those candidates least susceptible to any disproportionate influence by contributors. Self-financed candidates are, by definition, financially beholden solely or principally to themselves. If anything, the Amendment encourages corruption by allowing self-financed candidates' expenditures to trigger higher cash contributions to their opponents.

Neither can any novel "equalization" interest justify the Amendment. The right to speak does not entail the right to speak as loudly or as effectively as one's rivals. It is not for the government to choose sides in order to equalize speaking power. Even if such an interest were not "wholly foreign to the First Amendment," it would fail the test of narrow tailoring here because Section 319 helps entrench well-funded incumbents against competition from their self-funded challengers.

Finally, any anti-distortion interest the government might advance here is a *post hoc* invention. Such an interest in any event has no application outside of corporate speech and could be advanced through less speech-restrictive means.

The Millionaires' Amendment may be best explained as a provision passed by incumbents for incumbents, as the legislative record confirms. In a political landscape where incumbents almost always win, the Amendment contains the most formidable threat to any incumbent's continued supremacy—a self-financed challenger with money to match conviction. Such suppression of dissent is inimical to the First Amendment.

ARGUMENT

I. THE MILLIONAIRES' AMENDMENT UNCONSTITUTIONALLY BURDENS CORE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT.

In *Buckley v. Valeo*, this Court struck down limitations on personal expenditures by a candidate in support of his own candidacy. 424 U.S. 1, 51-54 (1976). "[T]he First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. Rejecting a provision of the Federal Election Campaign Act ("FECA") that capped the amount of personal funds a candidate could spend on his own campaign, this Court recognized that "[t]he [self-financed] candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Id.* at 52.

By enacting Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the so-called

"Millionaires' Amendment,"[2] Congress attempted an impermissible end run around *Buckley*, using means less blatant but no less unconstitutional to limit the speech of self-financed candidates. Instead of placing a direct ceiling on the amount of personal funds a candidate may spend on his own candidacy, the Millionaires' Amendment penalizes a candidate who spends in excess of $350,000 of his own funds by subjecting him to additional reporting requirements and trebling the fundraising capabilities of his opponent.[3]

The Amendment thus burdens core political speech in three ways: it deters and penalizes a self-financed candidate's political speech; it deters and penalizes speech by a self-financed candidate's contributors; and it diminishes the quantity and quality of political speech overall by discouraging candidacies that historically have made robust contributions

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[2] Section 319 is codified at 2 U.S.C. § 441a-1 and only applies to elections for House of Representatives. The "Millionaires' Amendment" provision for Senatorial elections is found in Section 304 of the Act, codified at 2 U.S.C. § 441a(i).

[3] Under the Amendment, if a self-financed House candidate spends more than $350,000 in personal funds on his campaign, his opponent may, in some circumstances, (1) receive contributions at treble the $2,300-per-election limit for each donor; (2) receive these trebled contributions from donors who have already reached the $42,700-per-election-cycle limit for aggregate campaign donations; and (3) in general elections, coordinate with a political party committee to receive additional party expenditures over the normal $42,100-per-election limit in states with more than one congressional district, and the $82,100-per-election limit in states with only one congressional district. 2 U.S.C. § 441a-1(a)(1); Price Index Increases for Expenditure Limitations, 73 Fed. Reg. 8696 (Feb. 14, 2008).

to our democracy. Accordingly, the Millionaires' Amendment deserves the strictest First Amendment scrutiny.

A. Section 319 Burdens Self-Financed Candidates' Speech.

Section 319 burdens self-financed candidates' political speech both by imposing formidable reporting requirements upon such candidates and by transferring comparative advantage to their opponents. It therefore warrants strict scrutiny as a regulation of expenditures. As opposed to contribution regulations, which infringe upon speech indirectly, expenditure regulations are "direct restraints on speech" and are subject to "the exacting scrutiny required by the First Amendment." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (internal quotations omitted).

1. Special disclosure requirements imperil self-financed candidates.

Section 319 directly burdens self-financed candidates' political speech by imposing special disclosure obligations upon them,[4] and by punishing noncompliant candidates with civil penalties of up to 100% of the triggering expenditures, or up to 200% for knowing and willful violations. 2 U.S.C. § 437g(a)(5)-

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[4] The Millionaires' Amendment requires a candidate who intends to spend in excess of $350,000 to file a declaration stating such intent within 15 days of becoming a candidate; to file initial notification within 24 hours of spending in excess of $350,000; and, after passing the $350,000 threshold, to file additional notifications within 24 hours of spending anything over $10,000. 2 U.S.C. § 441a-1(b)(1).

(6). This burden is obvious and serious: no less than seven congressional candidates, including these *Amici*, have already suffered fines in amounts from $34,000 to $91,000 for supposed noncompliance.[5] Although the FEC downplays the declaration requirement as entailing nothing more than candidates' "estimates" of their projected personal expenditures, the FEC has in fact censured at least one candidate for failing to timely file a declaration of intent to spend personal funds when the candidate later decided to increase the amount of his personal spending.[6]

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[5] These candidates include *Amicus* Broyhill, *see* FEC, CONCILIATION AGREEMENT (June 26, 2006), http://eqs.nictusa.com/eqsdocs/00005581.pdf (fined $71,000); Mike Crotts, *see* FEC, CONCILIATION AGREEMENT (July 18, 2005), http://eqs.nictusa.com/eqsdocs/000045A7.pdf (fined $40,000); *Amicus* DeRossett, *see* FEC, CONCILIATION AGREEMENT (Aug. 8, 2007), http://eqs.nictusa.com/eqsdocs/0000684D.pdf (fined $59,000); Sandy Lyons, *see* FEC, CONCILIATION AGREEMENT (Feb. 3, 2006), http://eqs.nictusa.com/eqsdocs/0000516D.pdf (fined $34,000); John Raese, *see* FEC, CONCILIATION AGREEMENT (Dec. 3, 2007), http://eqs.nictusa.com/eqsdocs/00006797.pdf (fined $74,500); James Socas, *see* FEC, CONCILIATION AGREEMENT (Mar. 10, 2006), http://eqs.nictusa.com/eqsdocs/00005041.pdf (fined $68,250); Charles Taylor, *see* FEC, CONCILIATION AGREEMENT (Dec. 12, 2006), http://eqs.nictusa.com/eqsdocs/00005967.pdf (fined $91,000).

[6] Mike Crotts, a House candidate in 2004, filed an initial amended Form 2 in September 2003 declaring that he did not intend to spend personal funds. In October 2004, he loaned to his campaign $400,000 funded by a personal home equity line. The FEC left open the possibility that its censure was for Crotts' failure to be prescient about his later decision to spend personal funds beyond the threshold. *See* FEC, CONCILIATION AGREEMENT (July 18, 2005), http://eqs.nictusa.com/eqsdocs/000045A7.pdf.

The disclosure requirements also compel self-financed candidates to reveal, at crucial campaign junctures, personal information they otherwise would not. While self-financed candidates would ultimately need to disclose the amount of their personal expenditures to the FEC, the special disclosure requirement puts the issue of their personal wealth front and center at the start of election season. Instead of being free to frame their candidacies and to make disclosures on the schedule followed by other candidates, particularly their opponents, self-financed candidates are forced to announce themselves as "fat cats" at the inception of their campaigns.

While upholding FECA's disclosure requirements for political campaign contributions and expenditures in *Buckley*, this Court treated such disclosure requirements as burdens on protected speech requiring a compelling justification. 424 U.S. at 64-68. "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. Accordingly, mandatory disclosure can be justified only by government interests surviving "exacting scrutiny." *Id.*; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995) (mandatory reporting "undeniably impedes protected First Amendment activity"). Thus, were the Millionaires' Amendment limited to disclosure requirements, and nothing more, it would still be subject to strict scrutiny of both its ends and means.

2. *Increased contribution limits force self-financed candidates to enable the counterspeech of their opponents.*

The Millionaires' Amendment also penalizes the self-financed candidate's expenditures by expanding his opponent's relative fundraising capabilities. While self-financed candidates remain shackled by the normal limits for individual and aggregate contributions and for coordinated expenditures, opponents are free to enjoy trebled individual contributions from donors freed from aggregate contribution limits, and to benefit from relaxed limits on coordinated expenditures.[7]

It makes no difference that here, unlike in *Buckley*, there is no absolute ceiling on a self-financed candidate's expenditures. Regulations that deter or penalize protected speech trigger strict First Amendment scrutiny no less than outright bans. *See, e.g., United States v. Playboy Entm't Group*, 529 U.S. 803, 812, 826 (2000); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Moreover, making one's expression a trigger for an opponent's enhanced competing expression is as much a burden on speech as government dampening one's expression in the first place. *See Miami Herald*

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[7] In addition to the *trebled* contribution limits that may be triggered in House races under the Amendment, the Senate version may allow opponents of self-financed candidates to raise *six* times the normal contribution amounts from individuals. *See* 2 U.S.C. § 441a(i)(1)(C)(iii). Although not before the Court, the Senate version of the Millionaires' Amendment is even more burdensome on First Amendment rights.

Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a state law requiring a newspaper to afford political candidates space for replying to its criticism).

Nor does it matter that the government here does not restrict the self-financed candidate but rather confers a windfall on his opponent. In a competitive race, it makes no difference whether the government slows down a faster sprinter by shackling his heels or gives the slower sprinter a head start that gives him one-third the distance to run; such a transfer of relative advantage might not prevent the faster runner from running as fast as he can, but nonetheless might alter the outcome of the race. So too here: for the prototypical situation the Millionaires' Amendment addresses, where a self-financed candidate is pitted against an opponent vying for the same office, it makes no difference whether the self-financed candidate's contribution limits are shrunk to a third (say, from a baseline of $6,900 to $2,300) or the opponent's are trebled (say, from $2,300 to $6,900), once some personal expenditure threshold is cleared—in either event, the competitive penalty is functionally and constitutionally the same.

Compounding the offense to the First Amendment, this transfer of relative speaking power is a direct response to the candidate's own speech. If a candidate chooses to self-finance, he must enable hostile counterspeech that would not exist but for the candidate's decision to advocate his own election. In effect, the Amendment compels a self-financed candidate to support his opponent's campaign.

This is presumptively unconstitutional, for although a speaker may not "have the right to be free

from vigorous debate," he "does have the right to be free from government restrictions that abridge [his] own rights in order to 'enhance the relative voice' of [his] opponents." *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 14 (1986); *see also Tornillo*, 418 U.S. at 256-57 (holding that speech on one side of the debate cannot trigger a benefit to the other side). As the Eighth Circuit explained in holding unconstitutional a comparable provision of Minnesota's campaign finance law, the knowledge that a self-funded candidate's opponent will be freed of otherwise applicable campaign finance limits, "as a direct result of [one's] independent expenditure, chills the free exercise of that protected speech. This 'self-censorship' . . . is no less a burden on speech . . . than is direct government censorship." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) (citation omitted).

The chilling effect of the Millionaires' Amendment can be especially potent for "*non*-millionaire" self-financed candidates—aspiring politicians who might lack vast personal wealth but believe so strongly in their candidacies that they nonetheless are willing to overextend their own finances to fund them. The Amendment thus advantages incumbents not only against wealthy candidates, but also against self-financed candidates of relatively modest means yet devout belief who spend what they can in order to compete.

Amicus DeRossett fits this profile. A civil servant, he is not a millionaire, but felt so strongly about his candidacy that he borrowed against his home to run for Congress in 2004. DeRossett's precise situation was presciently outlined in the 2001 BCRA debate:

> Under the amendment that passed, some poor guy or woman who runs against me-I don't mean "poor" in the sense of not having anything-say they mortgage their home, and take a loan out someplace, and spend their own money. I would be able to increase my fundraising limits because they mortgaged their home. This is what the millionaire amendment does. It has nothing to do with millionaires. It has everything to do with protecting us. It is an incumbent advantage measure in this underlying bill.

147 Cong. Rec. S2845-02, S2852 (Mar. 26, 2001) (statement of Sen. Reid in opposition to BCRA).

True to Senator Reid's broader prediction, these burdens are indeed hindering self-financed candidates from challenging incumbents and chilling their speech. Before the passage of BCRA, the number of challengers whose personal expenditures exceeded BCRA thresholds had steadily increased over the previous ten election cycles. Jennifer A. Steen, *Self-Financed Candidates and the "Millionaires' Amendment," in* MICHAEL J. MALBIN, THE ELECTION AFTER REFORM 210 (2006). After BCRA, the number of self-financed challengers dropped from 17 in 2002 to 13 in 2004. *Id.* The practical effect of the Millionaires' Amendment thus may well have been that fewer self-financed candidates run for office and fewer incumbents are challenged. Similarly, in the 2004 congressional election, only 43 candidates self-financed above the BCRA thresholds, a decrease from 57 candidates in the 2002 cycle whose personal expenditures exceeded the thresholds subsequently enacted. *Id.* at 209.

The court below relied on lower court cases involving public financing that supposedly suggest Section 319 does not burden self-financed candidates' speech. *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007) (three-judge court). To be sure, lower courts have upheld state statutes that permit increased contribution and expenditure limits for candidates who agreed to participate in public financing programs. *See Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998); *Rosenstiel*, 101 F.3d at 1551; *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996); *VoteChoice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). *But see Day*, 34 F.3d at 1359-62 (invalidating a public financing scheme as an insufficiently justified burden on speech).

But these cases all turned on a feature absent from Section 319: the presence of a public subsidy. The courts of appeals declined to find impermissible coercion from the mere fact that a candidate's refusal to participate in a public funding scheme triggered relaxation of otherwise applicable limits on an opponent's fundraising. *See Gable*, 142 F.3d at 948-49; *Rosenstiel*, 101 F.3d at 1550; *VoteChoice*, 4 F.3d at 38-39. According to those courts, lifting limits on candidates participating in public funding merely offsets sacrifices they made by accepting public funding in the first place. *See, e.g.*, *VoteChoice*, 4 F.3d at 39. The statutes thus were not "inherently penal." *Id.* at 38; *Rosenstiel*, 101 F.3d at 1550.

But that premise does not hold for Section 319, which confers benefits upon opponents of self-financed candidates without them having made any

offsetting sacrifice. Unlike the triggers involved in the public funding cases, therefore, the Millionaires' Amendment does not compensate for a governmental burden that has been imposed on only one candidate; to the contrary, both candidates in this instance have been subject to *precisely the same* contribution limit. In this sense, the Millionaires' Amendment is "inherently penal" toward the self-financed candidate, irrespective of how a public financing scheme might properly be characterized.

In all these respects, the Amendment burdens self-financed candidates' speech so as to require strict scrutiny.

B. Section 319 Burdens the First Amendment Rights of Contributors to Self-Financed Candidates.

In addition to the burden it imposes directly on self-financed candidates, Section 319 also burdens the First Amendment rights of contributors by limiting their ability to choose and contribute as they see fit between competing candidates of their choice. As this Court recognized in *Buckley*, the ability to contribute money to a candidate for elective office is a protected part of freedom to associate. 424 U.S. at 25. Although this right is not absolute, *Buckley* noted that "the size of [a] contribution provides a very rough index of the intensity of the contributor's support for the candidate." *Id.* at 21. Section 319 infringes the right of association by disabling contributors from associating with a self-financed candidate to the same extent they may associate with his opponent.

Under the Millionaires' Amendment, the extent to which a contributor may exercise political speech in association with a candidate depends on *which* candidate he supports. Section 319's expanded contribution limits allow individuals to contribute up to $6,900 to the opponent of a self-financed candidate, while contributions to the self-financed candidate remain limited to $2,300. *See* 2 U.S.C. § 441a-1; 73 Fed. Reg. 8696, 8698. Thus, once a self-financed candidate triggers the Amendment, contributors to his campaign can express their support only one-third as strongly as his opponent's contributors. By making individuals' level of participation in the democratic process contingent on one's political views, the Millionaires' Amendment strikes at the heart of the First Amendment.

Worsening matters, Section 319 effectively taxes political contributions to self-financed candidates. Because the triggering formula includes outside contributions, every donation to a self-financed candidate helps enable his opponent to raise more money under the relaxed contribution limits. This penalty can be as high as 50% of the contributor's donation, since every $2 given to a self-financed candidate might allow his opponent to raise an extra dollar to catch up. *See* 2 U.S.C. § 441a-1(a)(2); (describing calculation of opposition personal funds amount ("OPFA")); *id.* § 441a-1(a)(3) (allowing opponents to self-financed candidates to raise 100% of OPFA under increased limits); *see also* 11 C.F.R. §§ 400.10, 400.31.[8]

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[8] This result will obtain when a self-financed candidate has triggered Section 319's relaxed contribution limits but has

This Court reiterated in *Shrink* that "a contribution limit involving 'significant interference' with associational rights . . . could survive [only] if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 25). Although not as demanding as the scrutiny applied to expenditure limits, the standard of review for regulations on contributions is nevertheless an exacting one. *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (striking down Vermont's contribution limits as too restrictive). Where, as here, a law distorts the political donation process by effectively choosing sides among contributors, especially exacting application of this standard is warranted.

C. Section 319 Burdens the Political System by Reducing the Quantity and Quality of Speech.

The Millionaires' Amendment burdens First Amendment interests not only by penalizing self-financed candidates' speech on behalf of their own candidacies and by taxing contributors' support of such candidates, but also by restricting the quantity and quality of political speech in the democratic system as a whole—a goal this Court found impermissible in *Buckley*, 424 U.S. at 57 (government may not control "the quantity and range of debate on public issues in a political campaign"). This too is an independent ground for applying strict scrutiny here.

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raised less money in outside contributions than his opponents by the relevant benchmark date. *See* 11 C.F.R. § 400.10.

The Millionaires' Amendment ignores the particularly important contributions that self-financed candidates make to electoral debate. Candidates who believe so strongly in their ideologies that they are willing to use their own money to advance their political messages increase political dialogue and, in turn, the competitiveness of elections. It is a fallacy, however, to suppose that personal wealth translates automatically into electoral success, for self-financed candidates lose elections routinely.

1. Self-financed candidates increase political dialogue.

Whether or not self-financed candidates ultimately attain political office, they meaningfully influence politics and policy by contributing to political debate during election campaigns and drawing attention to otherwise-neglected issues. As several prominent self-financed presidential campaigns illustrate, a self-financed candidate can influence debate by introducing new ideas that might not be forthcoming from candidates who must take safe positions to amass donations from contributors.

Self-financed presidential candidate Ross Perot, for example, focused his 1992 candidacy on a message of economic populism that defined the political debate in that election season and gave voice to millions of Americans whose concerns had gone unaddressed by the two major parties. Ross Anderson, *Bill Clinton's Big Debt to H. Ross Perot*, SEATTLE TIMES, Nov. 6, 1992, at A8 (Perot won 19 million votes by "point[ing] out the ideological bankruptcy of the major parties."). Perot characterized the federal budget deficit as comparable to "a crazy old aunt in

the attic" that neither party wanted to discuss. Ted G. Jelen, *If Gore Loses, He Can Point to Nader Votes*, NEWSDAY, Nov. 9, 2000, at A59. By the end of the decade, both the Republican and Democratic parties had endorsed plans to reduce the budget deficit and, by 1998, the federal government was operating at a surplus. *See* George Hager, *End of Deficit Era Marks Beginning of Battle Over Surpluses*, WASH. POST., Sept. 30, 1998, at C10.

Steve Forbes, another self-financed presidential candidate, contributed to political dialogue by focusing attention on ideas for radical tax reform, which—from the "flat tax" to the "fair tax"—that have remained salient in American politics since Forbes's 1996 campaign. James O'Toole, *Huckabee Candidacy Fueled by Stand on Tax*, PITTSBURGH POST-GAZETTE (Penn.), Dec. 9, 2007, at A13.

Self-financed candidates often run on campaign platforms that emphasize the independence of their ideas from those espoused by the special interests upon whom non-self-financed candidates depend. *See* JENNIFER A. STEEN, SELF-FINANCED CANDIDATES IN CONGRESSIONAL ELECTIONS 6, 15, 127 (2006). Senator Herb Kohl of Wisconsin, for example, spent more than $7 million of his own funds in his 1988 senatorial race, campaigning on the slogan, "Nobody's Senator but Yours." Jessica Lee, *Candidates' Wealth a Detriment No More*, USA TODAY, Oct. 5, 1994, at 2A. In the 2000 New Jersey senatorial race, self-financed candidate Jon Corzine campaigned under the slogan "Unbought and Unbossed." Michael Cooper, *Rich are Different*, N.Y. TIMES, Dec. 5, 2001, at D3. Similarly, Minnesota Senator Mark Dayton ran a primary election television advertisement in which

he stated, "I won't be workin' for the wealthy or the powerful, or the special interests, and won't be takin' my money from them. I don't need their money." Conrad deFiebre, *Routes Differ Sharply Along Money Trail*, STAR TRIBUNE (Minneapolis, Minn.), Sept. 27, 2000, at 1A.[9]

A candidate's decision to self-finance communicates a political message about his campaign: "Unbought and Unbossed."[10] Section 319 not only burdens this message, but also forces the candidate to communicate the opposite message: that self-financing *corrupts* the political process so as to warrant reporting and penalties. Thus, the Amendment does not merely seek to cure a problem that does not exist—namely, a candidate's "corruption" of himself through self-financing—but creates an appearance of corruption by casting aspersions on the self-financed candidate (see Part II.A *infra*).

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[9] Other self-financed candidates have noted their independent status without centering campaigns around it. Senate candidate Tom Bruggere, for example, stated, "No one owns me. I don't have special interests controlling me, and a $5,000 contribution won't buy me." Kenneth T. Walsh & Linda Kulman, *The Gilded Age of American Politics*, U.S. NEWS & WORLD REPORT, May 20, 1996, at 26, 28. More recently, Republican presidential candidate Mitt Romney commented that supporting his own candidacy kept him free of special interest influences: "I'm not beholden to any particular group for getting me in this race or getting me elected." Bob Dart, *Family, Mormonism, Wealth*, AUSTIN AMERICAN-STATESMAN (Tex.), Nov. 30, 2007, at A23.

[10] Voters themselves may embrace the campaign platforms of self-financed candidates, viewing these candidates as "buying immunity from special interests" rather than "buying the election." Jessica Lee, *Candidates' Wealth a Detriment No More*, USA TODAY, Oct. 5, 1994, at 2A.

2. *Self-financed candidates increase the competitiveness of elections by challenging incumbents.*

In addition to being likelier to inject novel ideas into political debate, self-financed candidates are better able than non-self-financed candidates to mount competitive races against incumbents—and they do. Incumbents enjoy numerous, tremendous advantages over challengers—greater name recognition, rollover funds (potentially on the order of millions of dollars) from prior campaigns, media access, comprehensive fundraising databases and strategies, franking privileges, and paid travel expenses for official duties, to name just a few—and overwhelmingly win reelection.[11] *See generally* GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 32-41, 85 (2004).

Non-self-financed candidates typically cannot keep pace with incumbents when it comes to fundraising. Without adequate funds and in light of the non-financial advantages already skewed in incumbents' favor, most non-self-financed candidates cannot compete against incumbents; indeed, few even try. *See* STEEN, *supra*, at 54. Although campaigns against incumbents are similarly difficult for self-

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[11] In the 2000-2006 House races, 94-98% of incumbents won reelection. *See* Center for Responsive Politics, The Big Picture: Election Stats, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2006 (94% in 2006); *id.*, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2004 (98% in 2004); *id.*, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2002 (96% in 2002); *id.*, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2000 (98% in 2000).

financed candidates, self-financed candidates are better able to use their financial resources to overcome incumbents' inherent institutional advantages. As the self-financed candidate gets closer to matching the incumbents' financial resources, the race becomes more competitive, and the amount of political dialogue, and thus political accountability, increases.

By lifting contribution limits for the opponents of such self-financed candidates, Section 319 effectively insulates incumbents by making it easier for them to avoid competitive challengers. As Senator Chris Dodd explained during floor debates on BCRA, the self-financed candidate who challenges an incumbent "spend[s] a million dollars of his own money to level the playing field" against the incumbent. 147 Cong. Rec. S2536-02, S2542 (Mar. 20, 2001). The Millionaires' Amendment tilts the playing field again, to the detriment of political debate.

3. Self-financed candidates' wealth does not translate automatically into electoral success.

Although self-financed candidates' campaigns thus increase both the quantity and quality of political dialogue, it is wrong to suppose that these candidates' resources will enable them to "buy" elections or corrupt the political process, for they rarely actually win. While candidates such as Ross Perot and Steve Forbes have been able to draw national attention to important issues, their spending millions of dollars on their own campaigns did not guarantee success.

In fact, the overwhelming majority of self-financed candidates do not win. *See* STEEN, *supra*, at

161 ("The bottom line is that self-financing has had a surprisingly small effect on election outcomes."). For example, in the 2002 House elections, before Section 319 was enacted, 50 candidates self-financed $350,000 or more.[12] Of the 50 candidates, only 10 won the general election.[13] During the congressional election cycles spanning 1990 through 1998, 16% of non-incumbent Senate candidates who self-financed $1 million or more won, compared to 32% of non-incumbent candidates who fundraised $1 million or more. In House elections during the same years, 21% of non-incumbents who self-financed more than $1 million won seats, compared to 67% of non-incumbents who fundraised more than $1 million. Jennifer Steen, *Maybe You Can Buy an Election, But Not With Your Own Money*, WASH. POST, June 25, 2000, at B1.

No amount of money guarantees success on Election Day. Al Checchi, for example, invested nearly $40 million in his campaign to win the California Democratic gubernatorial nomination, but lost to Lieutenant Governor Gray Davis. Todd S. Purdum,

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[12] The $350,000 figure includes both contributions and loans. The 50 candidates include those in primaries, special elections, and general elections.

[13] *See* FEC, Search Campaign Finance Summary Data (U.S. House, 2001-2002), http://www.fec.gov/finance/disclosure/srssea.shtml (select "2001-2002" under "Election Cycle" and "U.S. House" under "Office"; select an individual candidate to determine whether he or she self-financed $350,000 or more); *see also* FEC, 2002 U.S. House of Representatives Results, http://www.fec.gov/pubrec/fe2002/house1.htm (database listing voting data for Alabama through Mississippi), http://www.fec.gov/pubrec/fe2002/house2.htm (same for Missouri through Wyoming).

The Tried and True in California Triumph Over the Rich and New, N.Y. TIMES, June 4, 1998, at A1. Michael Huffington self-financed $28 million in the 1994 California Senate race and lost to the incumbent, Senator Dianne Feinstein. Susan Yoachum, *Huffington Concedes, Drops Voter Challenge*, S.F. CHRON., Feb. 8, 1995, at A3.[14] The consistent losses of self-financed candidates, regardless of how much they contribute to their campaigns, belie legislators' fear that these candidates will corrupt the political process.

Even when self-financed candidates do win elections, their personal spending is rarely the key to victory. *See* STEEN, *supra*, at 113. For instance, Peter Fitzgerald spent over $16 million and defeated Senator Carol Moseley Braun in the 1998 Illinois senatorial election. *Final Election Results*, USA TODAY, Nov. 5, 1998, at 6A. But Moseley Braun's reelection campaign was plagued by allegations of ethical breaches related to her expenditures of both personal and campaign finances and controversy over her meeting with a Nigerian dictator. Jon Jeter, *Moseley-Braun in Trouble*, WASH. POST, Oct. 1, 1998, at A16. Mark Dayton, who self-financed a $10 million campaign, also won against an opponent riddled with well-publicized personal scandal. *The Midwest*, WASH. POST, Nov. 9, 2000, at A39. The ability to self-

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[14] Additional examples include Mark Warner, *see* Ellen Nakashima, *Mark Warner's $10 Million Sets a Record in Virginia*, WASH. POST, Dec. 6, 1996, at A40; Darrell Issa, *see* Janet Hook, *Big Spenders Can Be Losers in Campaigns*, L.A. TIMES, June 5, 1998, at A1 (self-financed $12 million); and Charles Owen, *see* Paul West, *Primaries Demonstrate Money Isn't Everything*, BALTIMORE SUN, June 4, 1998, at 1A (self-financed $5 million).

finance simply enabled these challengers to be in the game and compete with incumbents; it cannot be assumed that it won them their elections.

Taken together, therefore, the Millionaires' Amendment's burdens on self-financed candidates, their contributors, and their contributions to political debate, clearly warrant strict scrutiny.

II. NO GOVERNMENT INTEREST JUSTIFIES THE BURDEN ON SPEECH THE MILLIONAIRES' AMENDMENT IMPOSES.

Since *Buckley*, this Court has "explicitly rejected" mere intermediate scrutiny for expenditure limitations, explaining that "expenditures restrictions [are] direct restraints on speech" that demand "exacting scrutiny," because core political speech is at stake. *See Shrink*, 528 U.S. at 386; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256-63 (1986) (requiring "compelling state interest" and applying traditional strict scrutiny analysis to expenditure restrictions).

Buckley and subsequent cases have recognized combating "corruption" as the only compelling interest that justifies meddling in the electoral marketplace—and even then, only when a regulation is genuinely likely to combat that corruption. Corruption, in this context, refers to problems arising when money changes hands between contributor and candidate such that the contributor may achieve "undue influence on an officeholder's judgment, and the appearance of such influence." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001). Such problems are, by definition, limited to monetary contributions and their functional equivalent, and

have *never* been thought to extend to independent expenditures.

As explained *supra* in I.A., however, the Millionaires' Amendment tracks, regulates, and penalizes independent expenditures by self-financed candidates. It does so by enabling *higher* cash contributions to candidates who are most desperate for the money because they are in danger of being outspent by self-financed candidates. The Amendment thus turns any anti-corruption rationale on its head. To the extent that the Millionaires' Amendment does not target corruption but rather aims to *equalize* electoral speaking power, that is an end *Buckley* rejected altogether as illegitimate. Any novel alternative justifications the FEC may posit are foreign to this Court's precedents and unsupported by the legislative record.

Lacking any other justification, the Millionaires' Amendment may reduce to incumbency protection, pure and simple. *Cf. Shrink*, 528 U.S. at 402 (Breyer, J., concurring) (calling for heightened scrutiny to guard against "such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"). BCRA's legislative history is bereft of an anti-corruption rationale for the House and Senate Millionaires' Amendments and does not reveal any convincing equalization rationale. Instead, the legislators (all incumbents by definition) repeatedly appealed to a different concern—namely, collective fear of being unseated by wealthy challengers.[15]

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[15] *See, e.g.*, 148 Cong. Rec. S2096-02, S2142 (Mar. 20, 2002) (statement of Sen. McCain) ("Congress has concluded that the

A. Section 319 Does Not Prevent But Actually Encourages Corruption.

Corruption is "the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office," *Buckley*, 424 U.S. at 25, and "post-election special favors that may be given in return" for large contributions, *id.* at 67. The anti-corruption rationale self-evidently cannot justify penalizing or discouraging a candidate's personal expenditures because there is no third party to exert influence in exchange for the funds; a candidate cannot corrupt himself. To the contrary, "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which . . . contribution limitations are directed." *Id.* at 53. The expenditure of

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contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election."); 148 Cong. Rec. H256-03, H261 (Feb. 12, 2002) (statement of Rep. Reynolds, opposing the House version of BCRA because the Millionaires' Amendment did not go far enough to protect incumbents) ("My colleagues should live in fear, all 435 of us, that a wealthy American decides to run . . . ."). *Cf. McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part and dissenting in part) (attributing the Millionaires' Amendment to incumbency protection). Senator McCain even predicted to reporters that a Millionaires' Amendment would pass because "everyone [was] scared to death of waking up one morning and reading in the newspaper that some Fortune 500 C.E.O. or heiress is going to run against them . . . ." Alison Mitchell, *Senate Votes to Aid Candidates Facing Deep Pockets*, N.Y. TIMES, Mar. 21, 2001, at A16.

personal funds frees the candidate to promote the electorate's interests over those of large donors. When voters elect a candidate with less allegiance to donors, the voters know they are electing the name on the ballot—not the patrons behind it. *See id.* at 67; *see also* Part I.B *supra*.

Even if an anti-corruption interest were in any way implicated by Section 319's burden on personal candidate expenditures, it is not narrowly tailored to serve any such interest. To the contrary, Section 319 only exacerbates any corruption problem. By allowing opponents of self-financed candidates to receive donations from contributors at up to three times the otherwise applicable limit, 2 U.S.C. § 441a-1(a)(1)(A), it allows contributors who are willing and able to donate at such large levels to obtain greater influence on elected officials. The candidate who invokes Section 319's provisions to avoid contribution and coordinated expenditure limits will presumably be especially beholden to the small number of contributors who are able to make large contributions quickly. If a self-financed candidate injects a large sum of cash into his campaign, the rival candidate will want to take in offsetting contributions as quickly as possible.[16] A candidate in this position will go to the contributors he knows have deep pockets and strong incentives.

Further, Section 319 increases any governmental concern that contributors will expressly or implicitly negotiate a *quid pro quo*. Because contributors will

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[16] The Amendment's rapid-fire disclosure provisions—requiring a 24-hour reporting turnaround—emphasize that time is of the essence. 11 U.S.C. § 441a-1(b)(2)(C)-(D).

be unlikely to know that the Section was invoked absent affirmative communication by the candidate, and because the candidate's existing contribution framework should already screen out over-the-limit contributions, it is unlikely that donors would know and choose of their own initiatives to make the enhanced contributions. Instead, the needy candidate will likely select and contact the largest donors for a special favor. Where *multiples* of the usual contribution amounts are at play, such exchanges are more likely to devolve into subtle or even explicit *quid pro quo* negotiations.

For all these reasons, Section 319 cannot be justified as preventing corruption or the appearance of corruption. It turns any such interest on its head.

B. A Purported Equalization Interest Cannot Save Section 319.

The FEC and the court below rely instead on a supposed interest in "equalization," or minimizing the perceived advantage of candidates who can help finance their own campaigns. M.D.A. 16-17; 501 F. Supp. 2d at 34 ("The Millionaires' Amendment is an attempt to provide at least a partial remedy for what Congress decided was an unavoidable problem when political opponents for elected office are not similarly situated in their abilities to fund a campaign from their own resources."). No equalization theory has ever succeeded in this Court because the Constitution protects the right to speak, not the right to speak as loudly or effectively as everyone else. Nor should such a theory succeed for the first time here.

In rejecting an equalization interest offered to justify FECA's ceiling on independent expenditures,

Buckley recognized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is *wholly foreign to the First Amendment.*" 424 U.S. at 48-49 (emphasis added). Accordingly, this Court has never upheld an equalization rationale as valid. *See Shrink*, 528 U.S. at 428 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

It is no answer to recharacterize the government interest here as simply reducing the time burden that the campaign finance regime imposes on candidates who must raise funds from contributors. First, the distinction makes no difference because funds (and obtaining funds) are part and parcel of speech itself. *Buckley*, 424 U.S. at 19. Second, this Court has already rejected the argument that the *Buckley* framework recognizes an interest in equalizing the relative time candidates spend on fundraising. *See Randall*, 126 S. Ct. at 2490.

Even if equalizing speaking power between self-financed candidates and their opponents *were* a valid interest, Section 319 would still fail strict scrutiny because it is not narrowly tailored to that interest. The "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. Because the Government asks for a novel equalization justification here, only the clearest empirical support for such a rationale will suffice.

For several reasons, however, Section 319 fails any requirement of narrow tailoring.[17] First, it discounts the contributions in a candidate's "war chest" by 50%. 2 U.S.C. § 441a-1(a)(2)(B)(ii). This was legislative logrolling: the legislators were well aware that incumbents would be the candidates with the largest pre-election war chests and they had to at least purport to offset this advantage. But it is untenable to justify offsetting this advantage by *only half* its actual value while accounting for *100%* of the value of personal expenditures. A dollar expended from an incumbent's war chest is no less valuable than a dollar expended from a challenger's personal savings, yet Congress—predictably—did not call a fair game in this regard. *See* 147 Cong. Rec. S3183-01, S3192 (Mar. 30, 2001) (statement of Sen. Durbin introducing the Senate version of the 50% offset provision) (explaining that the offset was created because "some incumbents may have cash on hand and that ought to be taken into consideration when you consider the triggers as to millionaires' expenditures."); *id.* at

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[17] In addition, the district court appeared to get certain particulars of the Amendment's supposed equalization features wrong. *Compare* 501 F. Supp. 2d at 26 (stating that the formula "adds 50% of the total funds raised by each candidate during the year prior to the election"), *with* 2 U.S.C. § 441a-1(a)(2)(B)(ii) (adding this number, the gross receipts advantage, only to the campaign-funded candidate); *accord* 11 C.F.R. § 400.10(a)(2)-(3) (expressing the same function in terms of alternative conditionals); *compare* 501 F. Supp. 2d at 26 (stating that Section 319's new limits end "[o]nce each candidate's OPFAs ["oppositional personal funds amount," which is the result of the 50%-adjustment formula] are equal"), *with* 2 U.S.C. § 441a-1(a)(3)(A) (calculating only one OPFA); *accord* 11 C.F.R. § 400.31(e).

S3195 (statement of Sen. Dodd) (identifying the incumbent-protecting feature of the offset).

Second, incumbents can further reduce the purported offset by moving funds between their primary and general election accounts. This is so because Section 319 looks only at the primary and general election account balance as of the benchmark date, after which the candidate is free to shift funds. *See* 11 C.F.R. § 110.3(c)(3). Third, the Section completely disregards contributions received after the benchmark date,[18] allowing a contribution-funded candidate to structure his donations and solicitations to occur after December 31.

Together, these features of Section 319 can exacerbate inequalities even if the self-financed candidate is somehow lucky enough to match the incumbent's war chest on the benchmark date. Suppose that Challenger A (an up-and-coming candidate with new ideas) and Incumbent B (the longstanding officeholder) each have $400,000 in campaign funds as of the December 31 statutory benchmark date. In the beginning of September, Challenger A goes on a media campaign to publicize her new platform. By September 5, Challenger A has exhausted her campaign treasury. In response, Incumbent B exhausts his funds as well. Incumbent B then holds a fundraiser on September 7, raising $1,000,000, which he spends by September 15. Challenger A does not have the political connections to put on such a large event; instead, on the same day, she gives her campaign a

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[18] Section 319 does not count contributions made after the statutory benchmark date. 2 U.S.C. § 441a-1(a)(2)(B)(ii); 11 C.F.R. § 400.10(b).

$500,000 loan to counter Incumbent B's $1,000,000 blitz. Challenger A's loan to herself triggers the Section's $350,000 threshold.

Under Section 319, Incumbent B can now take advantage of trebled contribution limits and increased coordinated party expenditures until B raises $500,000 in new funds. *See* 2 U.S.C. § 441a-1(a)(3)(A); 11 C.F.R. § 400.31(e). Incumbent B works his party connections, convincing the party to make $500,000 in coordinated expenditures by September 20. Disregarding—as the statute does—the money raised and spent by both candidates between December 31 and September 5, Challenger A spent a total of $900,000 whereas Incumbent B spent $1,900,000; and it is Section 319 that enabled B to inject $500,000 of that amount so quickly. In light of other built-in fundraising advantages that incumbents enjoy, *see supra* I.C.2, of which the Millionaires' Amendment takes no account, it is especially clear that the Amendment is underinclusive with respect to candidate equality.

The Amendment is also overinclusive because a self-financed candidate's personal expenditures do not necessarily translate dollar-for-dollar into a match for a contribution-funded candidate's media volume or quantity of speech. As *Buckley* recognized, self-financed candidates will not always have a net advantage, because "a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions." *Id.* at 54. Thus, wealthy candidates may need to finance large portions of their campaign in order to match contribution-funded candidates because voters—even if they agree with the wealthy candidate's platform—are

less likely to donate to a candidate that is well off. *Buckley* similarly noted that it may be harder for wealthy candidates to find the volunteer staff to make the campaign's speech as effective as possible. *Id.* Thus, a wealthy candidate might have to add his own funds not just to match his opponent but also to offset the inherent disadvantages his wealth and self-financing causes his campaign.

Finally, Congress had several less restrictive alternatives from which to choose. Assuming, *arguendo*, that lower court decisions upholding incentives to participate in public-financing schemes are correct, Congress could have made the voluntary choice to make public financing more attractive. *See* Part I.A *supra*. It might also have chosen a voluntary limit. For example, the most-debated alternative to the House bill that became BCRA contained a "voluntary personal funds expenditure limit." 148 Cong. Rec. H369-01, H381-82 (Feb. 13, 2002). This alternative would have allowed a "millionaire" candidate to declare to the FEC that he would not exceed the voluntary limit and authorized the FEC to monitor the candidate's spending and impose fines equal to personal funds spent in excess of the limit. *Id.* Candidates would have been encouraged to comply voluntarily by the risk of having their noncompliance publicized by the opposition. Such a provision would have been less restrictive than the Millionaires' Amendment, allowing voters to decide for themselves whether and how to account for a particular candidate's decision to self-finance.

C. Section 319 Cannot Be Justified as Counteracting "Distortion" Resulting from Self-Financed Candidates' Speech.

The FEC attempts to bolster its claim that equalization is a legitimate justification for Section 319, arguing that "a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support." M.D.A. 18. The FEC thus seeks to rationalize Section 319 as protecting voters' perceptions of campaign treasuries as indicators of popularity. But the Government's attempt fails because Congress has no legitimate interest in policing a candidate's expenditures to accord with what Congress considers popular support; and in any event this justification is *post hoc*. But even if Congress had some evidence that candidates' self-financing "distorts" the political process, Section 319 is not narrowly tailored to serve any anti-distortion interest.

This Court has never found that Congress has a valid interest in limiting the money a candidate expends to what Congress deems the candidate's popular support. The closest this Court has ever come to such reasoning is its decision in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), upholding a Michigan law prohibiting corporations from making political expenditures through corporate treasuries. *Austin*, however, was expressly about special features of the corporate form that enable "vast reservoirs of capital" to be amassed; these features gave rise to a corresponding interest in combating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with

the help of corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660-61. This Court has never expanded *Austin* outside the corporate context.

Nor should it here. There is nothing corrosive or distorting about a candidate's use of his own money to fund his own political campaign—to conclude otherwise would overrule *Buckley*. *See* 424 U.S. at 54. Indeed, this Court recognized in *Buckley* that the "normal relationship" between a candidate's funds and public support "may not apply where the candidate devotes a large amount of his personal resources to his campaign." 424 U.S. at 45 n.63. And *Buckley rejected* the notion that Congress may attempt to influence the amount of money that each candidate should have to spend on his campaign: "In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 57.

Setting aside that any anti-distortion interest is constitutionally foreclosed, no such interest is presented here. No legislative findings or record evidence supports such an interest, which Congress never invoked to justify the Millionaires' Amendment. Instead, FEC lawyers simply posit the interest *post hoc* in this litigation. Under heightened scrutiny, however, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Finally, Section 319 is not narrowly tailored to meet any anti-distortion objective. Other provisions of federal election law require that candidates disclose the source of their political contributions. *See* 2 U.S.C. §§ 431-439. A voter who sees lots of advertising by a self-financed candidate can turn to disclosure databases on the internet, discover that the money behind those ads came from the candidate himself, decide whether that money correlates with popular support, and, if not, what the implications are. With full disclosure, there is no distortion—an informed public can draw its own conclusions about individuals and their speech.

Section 319, if anything, impedes this disclosure regime by allowing opponents to self-financed candidates to exceed normal contribution limits, thereby diluting the natural relationship between funding and support that voters might otherwise infer. Thus, Section 319 undermines the effectiveness of the pre-existing disclosure rules. Accordingly, this Court should not allow the FEC to justify Section 319 as an anti-distortion measure.

In sum, anti-distortion is an end foreclosed by precedent, disconnected from Congress's actual purpose, and ill-fit to the means of the Millionaires' Amendment. Absent any other legitimate or plausible justification, the Amendment fails strict scrutiny.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

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February 27, 2008

Questions Presented

1. Whether the reporting requirements of § 319 of the Bipartisan Campaign Act of 2002 ("BCRA"), 116 Stat. 109 (codified at 2 U.S.C. § 441a-1) ("Self-Funding Candidate Provision"), unconstitutionally burden free speech.

2. Whether the raised contribution limits of the Self-Funding Candidate Provision unconstitutionally burden free speech.

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Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

Citizens United is a nonprofit (§ 501(c)(4)) Virginia

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[1]No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

corporation with its principal office in Washington, D.C. Citizens United was founded in 1988. Its purpose is to promote the social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. A principal means by which Citizens United fulfills its purposes is by producing documentary films. Citizens United joins this brief to advocate for free expression.

Summary of Argument

The district court decided that "Davis's First Amendment facial challenge fails at the outset because the Millionaires' Amendment does not 'burden[] the exercise of political speech.'" JS-App. 9a (citation omitted in original). This is erroneous because this Self-Funding Candidate Provision (*see infra* at n.3) imposes cognizable burdens on core political speech that trigger strict scrutiny.

The reporting requirements by themselves create cognizable burdens on a self-funding speaker. This adversely-affected candidate is forced to suffer the burdens of *unilateral* (1) long-range, advanced disclosure of strategic campaign funding information, (2) 24-hour disclosure of strategic expenditure information, (3) heightened risk of investigation and penalties, and (4) heightened recordkeeping and reporting.

Since *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), this Court has recognized that "compelled disclosure, in itself," creates a sufficient burden to require "exacting scrutiny." In *Buckley* and subsequent precedents, this Court has made clear, including in the disclosure con-

text, that "exacting scrutiny" means strict scrutiny, under which the government must show that a First Amendment burden is narrowly tailored to a compelling interest.

The reporting requirements fail strict scrutiny because (a) no anti-corruption interest is at issue since spending one's own money is non-corrupting and since Congress *raised* contribution limits for the candidate speaking with other people's money; (b) no informational interest may be considered because reporting is unilateral, making any assertion of interest underinclusive; and (c) no equality interest is cognizable. Because the Amendment requires reporting in order to function, the unconstitutionality of the reporting requirements makes the Self-Funding Candidate Provision entirely unconstitutional.

The raised contribution limits also unconstitutionally burden the self-funding candidate. The First Amendment requires that any burdens on free speech rights be viewed from the adversely-affected person's perspective. Two candidates vying for office are in a zero-sum competition, so benefits to one adversely affect the other. The district court was wrong in saying that there was no burden on the self-funding candidate, only a benefit to his opponent. The self-funding candidate suffers a cognizable First Amendment burden where—based on his expenditures of his own money for his own speech—the government rewards his opponent with the unilateral opportunity to receive substantial additional contributions from contributors who have already contributed at the level at which the government has asserted an interest in reducing quid-pro-quo corruption or its appearance.

This burden on the adversely-affected candidate fails strict scrutiny because (a) it is unsupported by any anti-corruption interest, (b) precedent precludes the equality interest on which the Amendment relies, and (c) no compelling interest in promoting a public-funding scheme exists or is at issue.

Argument

There are burdens at issue here. The district court erroneously decided that "Davis's First Amendment facial challenge fails at the outset because the Millionaires' Amendment does not 'burden[] the exercise of political speech.'" JS-App. 9a (citation omitted in original). But the reporting requirements of the Self-Funding Candidate Provision (or "Provision")[2] impose

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[2] ***Self-Funding Candidate Provision*** is a more neutral term than *Millionaire's Amendment* for BCRA § 319. And ***self-funding candidate*** is more neutral than *millionaire* as a term for the adversely-affected candidate, although the term must be understood in a context where both candidates may self-fund up to $350,000, and only the one who self-funds above that trigger is adversely affected by the Provision. Use of *millionaire* seems designed to tap social antipathy toward persons perceived to be wealthy. And it is flawed analytically.

Millionaire *status* is not the trigger. In a race the incumbent and challenger may *both* be millionaires and self-fund up to $350,000, but one funds her speech over the trigger amount with other people's money while her opponent feels the need for some self-funding above the trigger. A candidate need not even *be* a millionaire to loan, *see* 2 U.S.C. § 441a-1(b)(1)(A)(ii), his campaign committee more than $350,000 secured by "personal funds," which include "any asset." 2 U.S.C. § 431(26). It is easy to imagine a non-

four cognizable burdens. The raised contribution limits also impose a burden when properly viewed from the adversely-affected candidate's perspective. These burdens on core political speech trigger, and fail, strict scrutiny.

I. The Reporting Requirements Unconstitutionally Burden Core Political Speech.

The Self-Funding Candidate Provision depends on unilateral, compelled disclosure of strategic campaign information in order to function. Since the reporting requirements create burdens triggering strict scrutiny, which they fail, *see infra*, the whole Provision is unconstitutional, even without considering the raised contribution limits.

A. The Requirements Burden Free Speech.

The reporting requirements burden free speech because "compelled disclosure" is automatically a First Amendment privacy burden: "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. *Buckley* identified interests in protecting privacy

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millionaire challenger, lacking the incumbent's name recognition, who is willing to "bet the farm" as collateral to launch his campaign, expecting to regain the family farm by successful fundraising. This farmer hopes *not* to actually part with "personal funds," and might not. But he would yet be burdened by his opponent's increased contribution limits—even if that loan is quickly repaid. *See* FEC Adv. Op. 2003-31 (Dec. 19, 2003). Congress provided no provision for reducing contribution limit waivers when campaigns repay such loans—which would be required by strict-scrutiny narrow tailoring (if a compelling interest existed).

and in avoiding harassment of those associated with a group. *Id.* at 64-66.

This case also involves compelled disclosure and a First Amendment privacy right, but it is based on the candidate's free speech rights, not association. Compelled disclosure of private, strategic campaign information also violates the self-funding candidate's First Amendment right to engage in the "*effective* advocacy" that *Buckley* recognized as a candidate's right. *Id.* at 21 (emphasis added). *Cf. AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (compelled disclosure of "confidential internal materials" violates privacy right and "seriously interferes with internal group operations and effectiveness"). The fact that the disclosure is about reporting money does not alter the free-speech nature of the analysis because "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 19.

The reporting requirements impose four distinct burdens on a self-funding candidate's free-speech rights to privacy and effective-advocacy—whether or not they "chill" the self-funding candidate.

A "chill" is not required, although handicaps might well chill candidate contributions, loans, speech, and participation. The district court correctly "recogniz[ed] that electoral politics may be a zero-sum game in which a benefit conferred on one candidate is a disadvantage to his opponent," JS-App. 11a, but it then

erroneously declared that Davis "fails to address the only issue that might raise constitutional concerns: whether the benefit conferred chills political speech." *Id.* But handicapping burdens must be justified apart from whether a candidate is "chilled" from speaking or participation by them. For example, *Buckley* spoke of "chilling" resulting from vague laws, 424 U.S. at 40 n.47, and potential "chill and harassment" of contributors to unpopular groups resulting from compelled disclosure. *Id.* at 74. But in the relevant context of a limit on candidate expenditures, a "*handicap*" burden was cognizable, whether or not the candidate was chilled from participation: "[T]he equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id.* at 56-57. A candidate might well be willing to assume the handicaps of the Provision presently at issue and run for office, as Davis did, but the willingness to assume unconstitutional handicaps does not make the burdens constitutional.[3]

The four distinct burdens imposed by the reporting requirements are unilateral. Nothing comparable is required of the opponent.

First, the Provision burdens the self-funding candidate by requiring him to provide long-range, advanced disclosure of strategic campaign receipt information.

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[3]Compare the situation of a defendant charged with illegal speech, e.g., under an obscenity statute, who may always raise a First Amendment defense even though he was obviously not chilled from speaking.

Cf. AFL-CIO, 33 F.3d at 178 ("substantial First Amendment interests in the disclosure of . . . internal materials that included "activities, strategies and tactics," *id.* at 177). Within 15 days of becoming a candidate, the candidate must file (with the FEC, the opposing candidate, and the opposing candidate's national party) a Declaration of Intent "stating the total amount of expenditures from personal funds that the candidate intends to make . . . that will exceed $350,000." 2 U.S.C. § 441a-1(b)(1)(B). The Declaration is filed on FEC Form 2 and signed under the penalties in 2 U.S.C. § 437g (investigations, enforcement actions, and fines and imprisonment for violations, including the submission of false, erroneous, or incomplete information)—a point that the Provision specially points out by including an atypical reference to the enforcement and penalty provision. *See* 2 U.S.C. § 441a-1(b)(3).

Only the self-funding candidate must disclose this strategic planning information about his campaign budget. Other candidates simply state "$0" on Form 2, revealing nothing about projected levels of spending (and nothing about their possible self-funding up to $350,000). Strategic information about projected resources and spending is closely protected by campaigns, which would never voluntarily disclose such information in advance because it would help the opposition. Candidates normally disclose receipts and expenditures (on FEC Form 3) in quarterly reports that can permit disclosure to occur up to 4 months *after* these transactions occur,[4] so that opposing campaigns

[4]Campaign committee receipts (or expenditures) on

must try to figure out an opponent's financial strength based on past (never projected) receipts. This requirement imposes a clear handicap on the self-funding candidate and also provides a disincentive to using his own money to speak.

Second, the self-funding candidate is burdened by the 24-hour expenditure disclosure requirements. Within 24 hours after he "makes or obligates to make," more than the trigger amount, he must file an "initial notification." 2 U.S.C. § 441a-1(b)(1)(C). Within 24 hours of each additional $10,000 of expenditures or obligations, another notification must be filed. 2 U.S.C. § 441a-1(b)(1)(D). These notifications (on FEC Form 10) must be filed with the FEC, the opposing candidate(s), and the opposing political party, and they require the strategic information of the "date and amount of each expenditure." 2 U.S.C. § 441a-1(b)(1)(E).

This reporting, both as to actual and planned expenditures (obligations), provides valuable information to an opposing candidate as to when major media buys and other readily-identifiable, big-ticket expenses are in the works—all long before they would be known under the regular reporting required of every candi-

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October 1 of a non-election year would not be disclosed until January 31, keeping the opposition in the dark as to available funds for four months. *See Instructions for FEC Form 3 and Related Schedules* at 3 (available at www.fec.gov). Other quarterly reports are due April 15, July 15, and October 15. *Id.* A 12-Day Pre-Election Report provides additional disclosure before primaries and general elections. *Id.* And a 48-Hour Notice of Last-Minute Contributions within 20 days of the election is required (FEC Form 6).

date. The self-funding candidate must make disclosures that might not have to be made otherwise for up to 4 months—the time that he will have to await information as to the date and amount of his opponent's expenditures. Information on spending is strategic information that a candidate would ordinarily keep private until all candidates are equally required to disclose their activities. These ongoing, unilateral disclosures of strategic information impose a clear handicap, and also disincentives, to self-funded speech.

Third, the self-funding candidate is burdened by a unilateral, heightened risk of investigation[5] and penalties triggered by the requirement of declaring how much a candidate intends to spend for the primary

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[5]The investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). This is particularly true with FEC investigations because "[t]he sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the first amendment's protection." *FEC v. Florida For Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982). *See also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (Because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," the Commission's investigative authority is subject to "extra-careful scrutiny from the court."); *AFL-CIO*, 333 F.3d at 170 ("Commission investigations . . . frequently involve subpoenaing materials...'represent[ing] the very heart of the organism which the first amendment was intended to nurture and protect'. . . .").

and general elections. As noted above, the Provision atypically includes a specific reference to the penalties. *See* 2 U.S.C. § 441a-1(b)(3). FEC Form 2 includes the following caveat under the Declaration of Intent to Expend Personal Funds: "**NOTE:** Submission of false, erroneous, or incomplete information may subject the person signing this Statement to penalties of 2 U.S.C. §437g."

If the self-funding candidate ends up using more personal funds than he declared that he intended to spend many months ago, there will be questions as to whether he should be subjected to penalties for filing a false report. His opponent will want to know whether the self-financing candidate was trying to keep that strategic information from her, even though she has no parallel advanced disclosure obligation. A complaint and investigation are highly likely, in which the FEC will seek more private campaign information in the form of strategic plans and internal correspondence to determine if there is evidence to counter the declared intent. Dealing with all the requests made in an FEC investigation is time-consuming and costly, imposing a serious burden on the ability of a campaign to function. *See, e.g., AFL-CIO,* 333 F.3d at 172 (three-year investigation).

Yet given the vicissitudes of political campaigns, how can a self-funding candidate project, months in advance, how much money his campaign might need? Experience might help inform such a projection, but that would favor incumbents, not newcomer challengers. A candidate making a low projection might have simply been optimistic that more contributions from others would be forthcoming, but is at the same height-

ened risk for a complaint and investigation as if he had sandbagged his opponent. Only the self-funding speaker is forced to assume the burden of this risk.

Fourth, the self-funding candidate is burdened, not just by the disclosure of strategic information as described above, but also by doing heightened record-keeping and reporting not required of his opponent. While all campaigns must keep records of receipts and expenditures and disclose them in generally-applicable reports, the self-funding candidate must do more. The requirement to file another 24-hour report every time $10,000 is expended is especially problematic (apart from the compelled disclosure of strategic information discussed *supra*) because the too-low (and so not narrowly tailored) threshold requires continuous, contemporaneous reporting. In a race that runs to $2 million dollars in expenditures for a candidate, the repeat-reporting trigger would be just .5% of expenditures. Staff must be hired to do this burdensome compliance, which requires a substantial amount of time, and for which there are penalties for late or missing reports.[6]

These are four distinct burdens—in addition to the more general burden of compelled disclosure itself, with the concomitant loss of privacy rights—on the self-funding candidate's efforts to get his campaign

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[6]The $10,000 expenditure reports do require the opposing candidate to file a 24-Hour Notice of Opposition Personal Funds Amount (FEC Form 11), calculating and reporting the extra funds that the candidate may receive. But this lesser reporting burden is offset for this candidate by the benefit of the raised contribution limits. Nothing provides compensation for the self-funding candidate's handicaps.

message out. These handicaps make it clear that the Self-Funding Candidate Provision burdens his First Amendment rights to free speech and effective advocacy. They are handicaps that might also chill candidate speech and participation, although the handicaps alone are enough to establish a burden regardless of whether the candidate is chilled, and a chill is unnecessary to trigger strict scrutiny. As shown next, these burdens trigger strict scrutiny.

B. Strict Scrutiny Is Required.

The reporting requirements are "compelled disclosure," which, "*in itself*, can seriously infringe on" First Amendment rights. *Buckley*, 424 U.S. at 64 (emphasis added) (collecting cases). Since the First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech," and this "'guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,'" *id.* at 15 (citation omitted), how may government violate one candidate's First Amendment privacy and effective-campaign rights to be free from burdensome compelled speech disclosing campaign plans and activities? An election-related disclosure requirement must clear two hurdles to escape the First Amendment's prohibition.

First, it must be "unambiguously campaign related." *Id.* at 81.[7]

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[7] *Buckley* established this Court's "unambiguously campaign related" requirement as a separate test *in addition to* "exacting scrutiny": "We *also* have insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 64 (emphasis added; footnotes and cita-

Second, an election-related disclosure requirement must survive strict scrutiny. *Id.* at 64, 66. *Buckley* used "*exacting scrutiny*" as a synonym for "strict scrutiny":

> We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. [*Id.* at 64 (footnote and citations omitted).]

Buckley and subsequent precedent make clear that "exacting scrutiny" means "strict scrutiny."

In *Buckley*, it was clear, by the term "exacting" and the rejection of mere "legitimate" interests, that strict scrutiny was intended. *Id.* This Court expressly described "exacting scrutiny" as "[t]he strict test." *Id.* at 66. And it included a discussion of "least restrictive means," *id.* at 68, a hallmark of strict scrutiny. *See*,

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tions omitted). In applying the unambiguously-campaign-related requirement, this Court held that disclosure must be "unambiguously related to the campaign of a particular federal candidate," *id.* at 80, so that "the relation of the information sought to the purpose of the Act [is not] too remote" and "impermissibly broad." *Id.* at 80. This Court said that the requirement assures that the compelled disclosure is properly related to "[t]he constitutional power of Congress to regulate federal elections." *Id.* at 13 (footnote omitted). A law that survives this threshold test (as does the one at issue here) must yet be narrowly tailored to a compelling governmental interest, such as preventing quid-pro-quo corruption.

e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Moreover, this "exacting scrutiny" is stricter than *Buckley*'s scrutiny for contribution limits, in which the government must show "a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25.

In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (dealing with disclosure), this Court expressly equated "exacting scrutiny" with strict scrutiny: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). *McIntyre* termed this "the strictest standard of review." *Id.* at 348. Note the further use of synonyms when *McIntyre* equated "overriding state interest" with compelling interest. *Id.* at 347.

The *Bellotti* decision to which *McIntyre* referred also plainly equated "exacting scrutiny" with strict scrutiny:

> [E]xacting scrutiny [is] necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," "and the burden is on the Government to show the existence of such an interest." Even then, the State must employ means "closely drawn to avoid unnecessary abridgment."

Id. at 786 (citations omitted). Note the further use of synonyms as *Bellotti* equated "subordinating interest" with compelling interest, and "closely drawn" with narrowly tailored, *id.*, and then proceeded to equate "critical scrutiny" with strict scrutiny. *Id.*[8]

McConnell v. FEC, 540 U.S. 93 (2003), neither addressed nor altered the precedential standard of review. It did speak of the "important" interests identified in *Buckley*:

> We agree with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA. [*Id.* at 196.]

But, given the facts that (1) *McConnell* was not addressing or deciding the standard of review, (2) the cited *Buckley* decision was applying strict scrutiny, and (3) this Court often uses synonyms for analytical terms, nothing can properly be read into *McConnell*'s use of "important."

Nor can a new standard of review be properly read into *McConnell*'s statement that "disclosure require-

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[8]Lower courts have concluded that compelled disclosure requires strict scrutiny. *See AFL-CIO*, 333 F.3d at 176 (*Buckley* "conclud[ed] that the disclosure requirements . . . survived strict scrutiny"); *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("we subject California's disclosure requirements to strict scrutiny").

ments are constitutional because they "'d[o] not prevent anyone from speaking.'" 540 U.S. at 201 (citations omitted). The statement was not in the context of discussing the applicable scrutiny. *McConnell* was not purporting to alter the controlling standard of review. And such language could not constitute a test because it would grant Congress carte blanche for *any* disclosure scheme—regardless of interest, tailoring, or burden—so long as it does not "prevent" speech. If mere non-prohibition were the test, then *McConnell*'s own identification of "important state interests," *id.* at 196, was an unnecessary, meaningless analysis.

In sum, the reporting requirements impose distinct, constitutionally-cognizable burdens in the form of violations of a candidate's First Amendment rights to free speech, informational privacy, and effective campaigning. These are unconstitutional handicaps, which might also chill speech and participation, that are cognizable burdens regardless of whether the candidate is chilled. Strict scrutiny of the reporting requirements is required. As shall be shown next, those requirements fail strict scrutiny.

C. The Requirements Fail Strict Scrutiny.

Strict scrutiny requires a compelling interest to justify the First Amendment burdens. The three possible interests, i.e., anti-corruption, informational, and equality,[9] are examined next and found lacking.

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[9]The assertion that the reporting requirements are necessary to implement the Provision fails strict scrutiny. Both means and ends must be constitutionally permissible or else any means could be imposed to achieve some arguably permissible end. While the end sought here (purported

1. No Anti-Corruption Interest Applies.

No interest in limiting corruption justifies the reporting requirements. *Buckley* upheld $1,000 limits on contributions to candidates, deciding that an interest in "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions," 424 U.S. at 26, was "a sufficiently important interest," *id.* at 25, to justify the "abridgement of associational freedoms." *Id.* But no anti-corruption interest is cognizable in the present strict-scrutiny, free-expression context.

There is no quid-pro-quo corruption as to the self-funding candidate's speaking with his own money because *Buckley* held that a candidate cannot corrupt himself. *Buckley* expressly recognized this in striking down limits on a candidate's expenditures: "[T]he prevention of actual and apparent corruption of the political process . . . does not support the limitation on the candidate's expenditure of his own personal funds." *Id.* at 53. "Indeed," the Court added, "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks to which the Act's contribution limits are directed." *Id.*

As to the raised contribution limits that the self-

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equality) is itself unconstitutional, *see infra*, the burdens imposed by the means must also be independently justified by the government under strict scrutiny.

A corporate-form interest has been found compelling in some campaign-finance contexts, *see, e.g., Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), but that interest is inapplicable in this context.

funding candidate's opponent receives (which could not corrupt the self-funding candidate), there is also no cognizable corruption interest because the contribution limits are being *raised*. Waiving is not asserting.[10] Permitting liberty of contribution is not in itself corrupting.

The reporting requirements are not about third-party contributions, which are the source of potential corruption. They have nothing to do with a quid-pro-quo corruption interest on either side of the election contest. So the corruption interest cannot justify the First Amendment burdens that the reporting requirements impose.

2. No Informational Interest Applies.

The burdens of the reporting requirements cannot be justified with an informational interest. The general

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[10]The setting of a contribution limit is the government's assertion that candidates might be "bought" above this price. Since the government has raised the contribution limits, it has necessarily decided that the opponents of self-funding candidates can't be "bought" at the usual rate that it believes to apply. Unlike usual candidates, these moral paragons won't exchange financial quids for legislative quos, so the usual anti-corruption interest is waived. The government does not explain why these candidates are less susceptible to corruption by the sole reason of having an opponent who is spending inherently non-corrupting funds. One might rather expect that these candidates would be extra-grateful to those who came to their aid at a rate much beyond the usual going rate for contributions. In any event, for present purpose, raised contributions are a clear indication that the government perceives little or no risk of quid-pro-quo corruption in such situations.

disclosure requirements that apply to all candidates, e.g., quarterly reports of contributions and expenditures and special pre-election reports, were approved in *Buckley* on the basis of three interests advanced by disclosure: (1) informing the electorate, (2) preventing corruption, and (3) collecting data to detect violations of contribution limits. 424 U.S. at 66-68. None of these is applicable to support the special reporting imposed on a self-financing candidate. The second and third interests can be immediately dismissed because no anti-corruption interest applies, *see supra*, and none of the data required to be reported has any application to detecting circumvention of contribution limits.

The first interest, the informational interest, is not cognizable because the required reporting is underinclusive as to that interest. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[T]he Court need not decide whether achieving "impartiality" (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose.") While the self-funding candidate must provide long-range, private, strategic information about his campaign's funding, his opponent need not reveal anything about the planned level of her campaign funding. While the self-funding candidate must report within 24 hours of expending over $350,000, and each $10,000 thereafter, his opponent can sit back and wait to disclose her spending at the next quarterly (or other scheduled) report, keeping him in the dark about her activities. If Congress really had an interest in providing the public with the infor-

mation that these reporting requirements provide, then it would also require the non-self-funding candidate to disclose long-term, advanced information about her campaign's intended funding level along with 24-hour reporting of expenditures aggregating $10,000. The government's failure to do so means that it is not really asserting an interest in informing the public. Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly." *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

In any event, the public will receive full information about campaign contributions and receipts in the less-restrictive quarterly and pre-election reports that both candidates must file, so the special, unilateral disclosure requirements are redundant as to any public informational interest. Any asserted informational interest would be "insubstantial because voters may identify [the relevant information] under [other] provisions. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99 (1981). "It is clear, therefore, that [the challenged disclosure provision] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Id.* at 299.

3. No Equality Interest Applies.

The burdens of the reporting requirements cannot be justified with an equality interest. This Court rejected such an interest in *Buckley*: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amend-

ment . . . ." 424 U.S. at 48-49. This principle was stated in the context of striking down a statutory limit on independent expenditures by persons or groups in support of, or opposition to, candidates. The Court repeated its rejection of an equality principle: "The First Amendment's protection against government abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. Again the Court declared that "[n]either the voting rights cases nor the Court's decision upholding the . . . fairness doctrine support [the] position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." *Id.* at 49 n.55.

Buckley again rejected an equality interest when it struck down an expenditure limit on a candidate's use of his own money to campaign: "[T]he First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. The Court provided an additional rationale that should guide the present analysis: "[T]he limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts." *Id.* "Indeed," the Court concluded, "a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign." *Id.*

In short, the people—potential contributors and

voters—are the ones to evaluate and possibly act on equality principles, not Congress. "[G]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 791 n.31. "The First Amendment rejects the 'highly paternalistic' approach," *id.* (citation omitted), which the assertion of an equality interest constitutes. And the people receive the information they need for their consideration of equality factors from the ordinary quarterly and near-election candidate reports required of all candidates. And only the people may take into account all of the myriad factors that must be considered to even attempt to level the playing field for candidates—factors that extend far beyond personal financial resources, or incumbents' war chests to such intangibles as name recognition, fame, family history, connections, appearance (overly or inadequately photogenic), communication skills, endorsements, etc.

If there is any doubt left that equality may not be considered, note that this Court again rejected the equality rationale in *McConnell*. The Court noted that "equal resources," or "equalizing," is "not . . . a legally cognizable right." 540 U.S. 227. And it cited, inter alia, *Buckley*. *Id.* (citing 424 U.S. at 48).

As may be seen from the foregoing Part I analysis, the reporting requirements impose distinct burdens, so strict scrutiny is required, which the requirements fail. The Court need go no further because without the reporting requirements the Self-Funding Candidate Provision cannot function and should be struck in its entirety.

II. The Raised Contribution Limits Unconstitutionally Burden Core Political Speech.

The Self-Funding Candidate Provision allows the opposing candidate's contribution limits to be tripled if her opponent's personal funds for his campaign exceed $350,000. 2 U.S.C. § 441a-1(a)(1).[11] Should her "aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits . . . exceed[ ] 100 percent of the opposition personal fund amount," she ceases to enjoy the raised limits. 2 U.S.C. § 441a-1(a)(3)(A). Likewise, if his opponent withdraws from the race, the limits return to the original $2,300. 2 U.S.C. § 441a-1(a)(3)(B).

For the raised limits to violate the First Amendment, they must unconstitutionally burden speech. *Buckley*, 424 U.S. at 44. Because Davis is adversely affected by the raised contribution limits that impose a cognizable burden on core political speech, the limits must satisfy strict scrutiny. Because they do not, the limits should be declared facially unconstitutional.

A. The Adversely-Affected Person's Perspective Is Paramount.

The First Amendment protects the free-speech rights of citizens from governmental restriction "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). At its core it protects those whose free-speech rights are adversely affected by the law and requires

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[11]Coordinated expenditure limits are also waived. 2 U.S.C. § 441a-1(a)(1)(C).

that any analysis of its violation be viewed from the perspective of the adversely-affected party.

This Court's decisions have recognized this requirement: *Buckley* upheld contributions limits because they did not have "any dramatic adverse effect on the funding of campaigns and political associations," that is, those who sought to have their rights protected. *Id.* at 21. Likewise, this Court struck down as unconstitutional compelled disclosures in *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) because they "adversely affected" the NAACP and its members' ability to "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-63. *See also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73-74 (1990) (determining that employment promotion, transfer, recall, or hiring decisions adversely affected employees such that they burdened free speech and were subject to strict scrutiny).

Adhering to the requirement of employing the adversely-affected party's perspective is of particular importance in the context of elections and campaigns. As discussed above, *supra* Part I.A., campaigns involve core political speech in a closed environment that is fundamentally a zero sum game. As the Eighth Circuit has aptly stated, "to the extent that a candidate's campaign is enhanced by the operation of the statute, the [opposing] political speech of the individual or group who made the independent expenditure . . . is impaired." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). Because fundamental speech rights are at stake, the proper evaluation of those rights is critical to a just and proper result.

The district court below relied on public-funding

cases that disregard the First Amendment's core requirement. *See* JA-9a-13a. Those cases involve similar triggers with correlating disclosure requirements that modify either the spending or contribution limits of a class of candidates. But those cases are inconsistent with the First Amendment's requirement and this Court's jurisprudence regarding the proper perspective from which to review a purported speech injury—that of the adversely-affected party.

In *VoteChoice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993), the court reviewed Rhode Island's contribution "cap gap" that doubled the contributions a public-funding participant could receive from a person or PAC in a given year if triggered. *Id.* at 30. The court held that the cap gap was merely a part of Rhode Island's voluntary public-funding scheme and neither penalized nor coerced candidates into participating. *Id.* at 39. The court disregarded the effect the scheme has on the nonparticipating candidate, noting in passing that the "non-complying candidate suffers no more than a countervailing denial" of a benefit and focusing instead on the "rough proportionality" of burdens and benefits on those who participate in the scheme. *Id.*

The First Circuit affirmed its *VoteChoice* rationale in *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), upholding Maine's public-funding scheme. *Id.* at 472. The scheme provided matching funds to participants (made possible by reporting requirements of independent expenditures in excess of $50) and reduced contribution limits for nonparticipants to between $250 and $500, depending on the office sought. *Id.* at 451-52. The court was dismissive of any adverse affect on the

complaining party, noting that the scheme "in no way limits the quantity of speech . . . nor . . . threaten[s] censure or penalty," *id.* at 464, and focuses on the voluntary nature of the scheme. *Id.* at 466-67.

Daggett expressly discounts the rationale of *Day v. Holahan*, 34 F.3d 1356, notably omitted by the present district court below. *Daggett*, 205 F.3d at 464. In *Day*, a public-funding scheme that afforded matching funds based on the independent expenditures of both the nonparticipating candidate and third parties supporting that candidate was challenged. The Eighth Circuit struck down the scheme as a content-based burden that chilled speech and failed strict scrutiny. *Id.* at 1360-61.

In a subsequent Eighth Circuit decision, *Rosenthiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), the court held that Minnesota's public-funding scheme, with its $50 contribution refund to taxpayers giving to candidates participating in the scheme, was not coercive and, thus, did not burden First Amendment rights. *Id.* at 1552-53. It distinguished *Day* on factual grounds and adopted the rationale of *VoteChoice*, contending that because the public-funding scheme involved an exchange of voluntary restrictions for a benefit, it was not coercive. *Id.* at 1550-51.

Similarly, the Sixth Circuit in *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) adopted *VoteChoice*'s rationale to uphold Kentucky's $2-for-$1 matching provision for public-funding participants because the court could not determine whether the scheme clearly was coercive. *Id.* at 948-49.

These decisions, with the exception of *Day*, adopt an approach that is fundamentally flawed in two ways:

They do not properly evaluate the First Amendment burden from the perspective of the adversely-affected party, and they improperly assume that the nonparticipant can only be burdened if he or she is effectively coerced to participate.[12]

Instead of evaluating the specific circumstances of the challenged provision's adverse effects on a party, these courts have instead opted to generally evaluate the voluntariness of the scheme. In doing so, they dismiss these adverse effects as mere benefits to a participating opponent, even though it is clear that the benefits participating candidates receive are to the clear detriment to the nonparticipant. *See VoteChoice*, 4 F.3d at 38 ("whether Rhode Island's system . . . imposes a penalty . . . [or] confers a benefit . . . [is] comparable to bickering over whether a glass is half full or half empty.") Yet by doing so, they release free speech analysis from its foundational moorings to unnecessarily develop a novel jurisprudence for a deeply-rooted right. Only in such a circumstance could the district court conclude that raised limits "place[d] no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth" but instead "provides a benefit to his opponent." JS-9a.

When framed properly, it is clear that Davis is adversely affected by the raised limits. His opponent enjoys higher contribution limits than Davis merely because Davis decided to spend in excess of $350,000 of his own funds on his campaign. This disadvantages his ability to advocate on his own behalf as a candi-

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[12]A discussion of burden analysis can be found *infra* Part II.B.

date—an adverse effect on his political speech.

B. The Raised Limits Burden Core Political Speech.

Of course, an adverse effect of a law must also be a cognizable burden on free speech. *See Berkeley,* 454 U.S. at 295-96. Here, the adverse effects on self-funding candidates are a burden on core political speech.

The right to self-fund has been afforded substantial protection by this Court:

> [I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley, 424 U.S. at 52-53. Candidates can be chilled from either self-funding their own campaign from the outset or from funding their campaigns beyond the $350,000 trigger amount. Crucially, this makes the raised limits' burden involuntary: a candidate can (1) self-fund, and either be chilled from spending more than $350,000 or trigger the raised limits, benefitting his opponent and burdening his own campaign, or (2) forego self-funding completely and effectively self-censor to avoid the raised limits matter entirely.

Given that Davis would either forfeit or substantially encumber his free-speech rights regardless of the option he chose, one can hardly criticize him for self-funding his campaign. Yet the district court used this decision to conclude that Davis suffered no burden, stating that "[Davis] has failed to show that his speech has been limited in any way because of the benefits the

Amendment provides his opponent. In fact, Davis himself has *twice* elected to self-finance." JS-13a.[13] This myopic burden analysis mirrors the public-funding cases on which the district court relied, which required coercion in order for a recognized burden to exist.

The public-funding cases all held that non-participants are only unconstitutionally burdened by a public-funding scheme when the benefits and burdens that their participating opponent is subject to are so disparate as to have coerced them to participate. *See Gable,* 142 F.3d at 949; *Rosenthiel,* 101 F.3d at 1552-53; *Daggett,* 205 F.3d at 470-71; *VoteChoice,* 4 F.3d at 38-39. While it is true that such a circumstance would amount to a burden—a particularly egregious form of chill on those who might want to self-fund or raise their own funding—nothing in First Amendment jurisprudence suggests that coercion is the only legitimate burden. Moreover, these cases focus on whether there is a broadly coercive nature to the scheme, instead of evaluating the legitimacy of the specific claimed burdens placed upon the adversely-affected person before it.

This analytical shift substitutes for the preliminary question of whether an adversely-affected individual suffers a cognizable burden to his free speech rights a required generalized showing that the burdens and benefits of a scheme are so disproportionate as to be

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[13]The district court also concluded that because any burden Davis experienced is justified by legitimate interests, he suffered no burden. JS-12a-13a. This analysis confuses determining whether a burden exists with strict scrutiny itself.

coercive. This shifts the burden of proof away from those advancing the law, who traditionally must justify the infringement of a constitutional right, to the adversely-affected party, who must now show that his right is completely subverted by the scheme so that he is forced to become part of it. This is a particularly difficult task if the adversely-affected party is not part of that scheme, and it is contrary to this Court's jurisprudence.

Each of these public-funding cases purports to derive its analysis from *Buckley*. *Buckley* upheld a public-financing scheme that encouraged participation by giving free money to qualified participants in exchange for adherence to certain restrictions. 424 U.S. at 95. *Buckley* found public-funding to be constitutional because the trade-off that participating candidates made was voluntary. *Id.* In other words, the burden on the *participating candidate* was voluntarily agreed upon in exchange for a benefit.

By relying on *Buckley* as they did, the public-funding cases illogically extend this Court's consideration of a voluntary relinquishment of a right to more elaborate schemes that involve matching funds and impose disclosure requirements on those not participating in the scheme. These cases all involve public-funding schemes that have matching funds contingent on the amount spent by their nonparticipating opponent. They also place additional burdens on non-participants and, in some cases, those making independent expenditures, through elaborate reporting requirements in a purported effort to ensure the success of the public-funding scheme. *See, e.g., Daggett,* 205 F.3d at 465 (discussing Maine's $50 reporting

requirements). *See also Jackson v. Leake*, 476 F. Supp. 2d 515, 523-24 (E.D.N.C. 2006), *on appeal sub nom. Duke v. Leake*, No. 07-1454 (4th Cir. 2007). Yet these cases neglect to adequately weigh these additional burdens placed upon nonparticipants, burdens that were not part of the *Buckley* court's analysis in upholding the public-financing scheme before it. They emphasize the purported voluntariness of participation in the fund in an effort to tie their analysis to *Buckley*, all the while imposing a coerciveness standard that affords all but the most egregious burdens on free speech a free pass.

Yet the logical extension of *Buckley* is that any public-financing scheme (and any similar provisions) that involuntarily deprives a candidate of his right or unburdened ability to speak, regardless of his decision to participate, is unconstitutional or, at minimum, creates a cognizable burden subject to scrutiny. *See Buckley*, 424 U.S. at 95. Because the raised contribution limits substantially undermine Davis' right to speak, regardless of whether he self-finances, the raised limits burden core political speech.

C. The Raised Limits Fail Strict Scrutiny.

Unlike *Buckley*, which held that contribution limits restrict "one aspect of the contributor's freedom of political association," *Buckley*, 424 U.S. at 24-25, the present raised limits directly affect core political speech—the candidate's self-funded speech. So strict scrutiny applies.

Three possible interests might be served by the raised contribution limits: (a) an interest in equality, (b) an interest in promoting a public-funding scheme, and (c) an anti-corruption interest. The raised limits

serve none of these interests.

1. No Equality Interest Applies.

As discussed above, this Court has rejected an interest in equality as being compelling. *See supra* Part I.C.3. Even if such an interest were recognized as compelling, the raised limits do not legitimately serve this interest. First, the funds used to calculate when the raised limits are triggered include only those funds raised through December 31 of the prior year. 2 U.S.C. § 441a-1(a)(2)(B)(ii)(I). This inherently advantages incumbents, who, because they have run before and have significant connections, can raise money after that time with greater ease than a self-funding challenger, who lacks those advantages.

If the interest supporting this provision were truly in equality, the advantages incumbents enjoy would be included in the equation. It would take into account the advantages of holding office—an established staff, paid travel, franking privileges, media access—along with the benefits derived from having run for office before. But instead, the raised limits are underinclusive, targeting the one thing that is not necessarily inherent to incumbents and quite possibly the only advantage a challenger might have over an incumbent: wealth.

Moreover, in assessing whether a candidate is entitled to raised limits under the Self-Funding Candidate Provision, the provision fails to consider the circumstances surrounding a candidate's intent to spend in excess of $350,000. Raised limits are offered even in the circumstance where a candidate loans his campaign money with the hope of being reimbursed through fundraising at some later date. Non-millionaires, such as a farmer who puts up his farm as collat-

eral to run for office, or a candidate who, like Hillary Clinton, loans her campaign $5 million,[14] can trigger the increased limits through such a loan, even though not a penny of their own money may ultimately be spent towards their campaign. If the intent in providing raised limits was to only reach independently wealthy candidates, this oversight renders the raised limits overinclusive. The raised limits do not serve an equality interest.

2. No Public-Financing Interest Applies.

Despite the public-funding cases on which the district court relies, no public-financing scheme is involved in this matter that might serve to justify the raised limits. And public financing is only a legitimate, not a compelling, interest.

Buckley acknowledged a legitimate interest in public-financing because it was designed to avoid quid-pro-quo corruption. 424 U.S. at 96. Recognizing that the lower contribution limits asserted as necessary to minimize corruption were a burden, Congress sought to give the money directly to candidates who qualified for the funds. *Id.* The public-financing scheme before the *Buckley* court involved a voluntary bargain between the candidate and the government. *Buckley*, 424 U.S. at 95. No First Amendment burdens were in play, so a rational basis for the scheme was sufficient. First Amendment burdens are in play here. So only a

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[14]The congressional decision to protect only senators and representatives and not presidential candidates indicates both an incumbent-protective motive and a lack of seriousness about the asserted equality interest, due to underinclusiveness.

compelling governmental interest would suffice.

While the creation of a public-financing scheme might be motivated to minimize quid-pro-quo corruption, the matching funds aspect of public-funding schemes shift the interest from corruption to equality, which is illegitimate. The same can be said of the raised limits here.

3. No Anti-Corruption Interest Applies.

Given that the raised limits are triggered by the exercise of a candidate's decision to self-fund his or her own campaign, any suggestion of quid-pro-quo corruption is unfounded. *See id.* at 96 ("the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving . . . candidates from the rigors of *soliciting private contributions*") (emphasis added). But the FEC has asserted below and the Congressional Record reflects that the raised limits oppose the perceived corruption of self-funding. *See* 148 Cong. Rec. S2153 (Mar. 20, 2002) (Sen. Domenici) ("The large number of extremely wealthy candidates who spend large amounts of their own money to finance their campaigns reinforces this perception. Many people believe that candidates are attempting to buy their way into office"). In other words, there is allegedly something inherently corrupt about self-funding that warrants its regulation.

This Court addressed the infusion of large sums of money into election campaigns in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The *Austin* court expressed concern with large amounts of corporate money being spent supporting a candidate and recognized that "[c]orporate wealth can unfairly in-

fluence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660. This was particularly troubling to the Court because the corporate form, as a creature of the state, was created in such a way that large sums of money could be amassed and then expended on campaigns in a manner not indicative of popular support. *Id.* While these effects might be of concern in the corporate context, such is not the case for self-funding candidates.

Self-funding candidates are not creatures of the state, but individuals. And because "the First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion," *Berkeley,* 454 U.S. at 296, self-funding candidates are entitled to the same protections as any other candidate.

Further, public support is not only measured by financial support, but ultimately through voter support. It is up to the people to weigh and balance personal wealth when voting for the most qualified candidate. *Austin*'s analysis should not be extended.

Conclusion

The Self-Funding Candidate Provision, with its reporting requirements and raised limits, adversely affects Davis and burdens core political speech. It does not serve a compelling interest and should be struck down.

Respectfully submitted,

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